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No. 94-2097

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1994

THOMAS SHANNON and CRAIG BROOKS,

Petitioners,

vs.

CITY OF SANTA ANA, CITY OF COSTA MESA, PAUL WALTERS, DAVE SNOWDEN, WILLIAM LETIZIO, RAUL LUNA, MICHAEL FLEET, PAUL E. McCARTHY, ROBERT DURHAM, and BURTON SANTEE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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54 pp

QUESTIONS PRESENTED

1. Where a law enforcement official uses or approves the novel use of a weapon, like dogs, to attack and seriously injure persons and the official knows or should know that the weapon creates a substantial risk of causing serious injury or death in violation of the lethal force rule of *Tennessee v. Garner*, 471 U.S. 1 (1985), is the official entitled to qualified immunity because no court has held that the novel weapon is subject to the *Garner* lethal force rule?

2. Does the objective reasonableness standard of *Graham v. Connor*, 490 U.S. 386 (1989) apply to a post-arrest seizure of a person who escaped from police custody?

3. Does a person, under the objective reasonableness standard of *Graham v. Connor*, 490 U.S. 386 (1989), have a constitutional right of self-defense when attacked a dog likely to inflict serious injury, or may the police demand that the person passively submit when attacked by the dog?

4. Where police use of force violates well-established and fundamental police standards for the use of force, under the objective reasonableness standard of *Graham v. Connor*, 490 U.S. 386 (1989), may a court ignore that evidence and all expert testimony that the use of force was unnecessary and dangerous?

LIST OF PARTIES

Petitioners Thomas Shannon and Craig Brooks were plaintiffs and appellants in the courts below. Respondents City of Santa Ana, City of Costa Mesa, Santa Ana Police Chief Paul Walters, Costa Mesa Police Chief Dave Snowden, Santa Ana Police Officers William Letizio, Raul Luna, Michael Fleet, and Anthony Bertana, and Costa Mesa Police Officers Paul E. McCarthy, Robert Durham and Burton Santee, were the defendants and appellees in the courts below.

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1994

THOMAS SHANNON and CRAIG BROOKS,

Petitioners,

vs.

CITY OF SANTA ANA, CITY OF COSTA MESA, etc.,

Respondents.

Petitioners Thomas Shannon and Craig Brooks respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit filed in this proceeding on February 3, 1995.

OPINION BELOW

The decision of the Court of Appeals was not reported. It appears in the Appendix hereto [hereinafter "Apx."], Appendix A. No opinion was rendered by the District Court for the Central District of California. The judgment of the district court appears as Appendix C.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was filed on February 3, 1995. Apx. A-1. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on March 22, 1995. Apx. B-1. This petition for certiorari was filed June 20, 1995, 90 days within March 22, 1995. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Code, Title 42:

§ 1983. Civil Action for Deprivation of Rights.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. Proceedings Below

Petitioners Thomas Shannon and Craig Brooks filed a complaint against defendants alleging causes of action under 42 U.S.C. § 1983. Respondents City of Santa Ana, City of Costa Mesa, Santa Ana Police Chief Paul Walters, Costa Mesa Police Chief Dave Snowden, Santa Ana Police Officers William Letizio, Raul Luna, Michael Fleet, and Anthony Bertana, and Costa Mesa Police Officers Paul E. McCarthy, Robert Durham and Burton Santee, filed motions for summary judgment which were granted. Petitioners appealed. The Ninth Circuit affirmed.

B. Statement Of Facts

1. Thomas Shannon.

On June 29, 1991, Mr. Shannon was driving home with a friend when he argued with her, pulled the car over, and walked away. AER[1] 576-76A. Costa Mesa police officer claimed that he saw Mr. Shannon walking away from the car, yelled at him to stop, but that Mr. Shannon ran away and jumped over a fence into a backyard. AER 160. Mr. Shannon's friend identified him and said he was drunk. AER 167. Santee arrived and called for a police dog. AER 218; *see also* AER 172.

Santa Ana police officer Letizio responded with a dog. Letizio, his dog, and McCarthy entered the back yard. Letizio gave Santa Ana's standard "canine announcement," one time, in conformity with Santa Ana policy: "This is the police. We're

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[1] "AER" refers to Appellants' Excerpts of Record, the record before the Ninth Circuit.

going to use a police dog to find you. If you surrender now, the dog will not be used. You have 30 seconds." AER 78, 443. In accordance with policy, Letizio said nothing about the possibility that the dog might bite. *Id.* Letizio waited 30 seconds and after receiving no indication that anyone had heard the announcement, released the dog. AER 78, 444.

Mr. Shannon remembers nothing of the entire dog attack. Letizio and McCarthy's account follows. Within ten seconds, the dog "alerted" near some bushes. Without giving any further announcements or warnings, Letizio permitted the dog to enter the bushes. Two to three seconds later, Letizio heard sounds of a struggle, then heard Mr. Shannon screaming. After another two to three seconds, Letizio saw Mr. Shannon roll out of the bushes, the dog biting Mr. Shannon's right elbow. Letizio watched as Mr. Shannon struggled to free his right arm, told him to stop "fighting with the dog" and to raise his left hand in the air. Mr. Shannon did not respond but continued to "fight with the dog," grabbing the dog by the head. AER 172-73, 447, 473.

Five to ten seconds after the dog attacked Mr. Shannon, Letizio asked McCarthy to have two additional officers come to the backyard. AER 478, 484. Letizio kept yelling at Mr. Shannon to stop "fighting with the dog." Mr. Shannon again did not respond but continue to struggle with the dog by attempting to punch the dog in the head and trying "to get the dog in a head lock as if to dislodge the dog from his bite." AER 173-74. The dog continued to bite Mr. Shannon in the right elbow as Mr. Shannon rolled around on the ground. The two additional officers came into the back yard while Mr. Shannon was rolling around on the ground, screaming, with the dog biting him. AER 174, 484-86. McCarthy knew that the dog was hurting and injuring Mr. Shannon. AER 486. Because Mr. Shannon continued his "fight with the K-9," Letizio and McCarthy kept their distance and again requested Mr.

Shannon to "discontinue his fight with the K-9." Mr. Shannon, however, continued to roll around in the bushes pulling the dog over the top of him and continued "to try to put a head lock on the dog." AER 174. Letizio approached Mr. Shannon and tried to grab Mr. Shannon's left arm, but Letizio could not hold on because Mr. Shannon's arm was covered with blood and slippery. Letizio again told Mr. Shannon to "quit fighting the dog" and to "put his left hand out." According to Letizio, at this point Mr. Shannon put his arm out and McCarthy put a handcuff on it. Then, Letizio was "in a position where [he] could gain control" of the dog, so he grabbed the dog by the collar and called it off. AER 174. According to respondents, the attack lasted 30-45 seconds. AER 79, 480.

According to medical records, the dog bit Mr. Shannon in the *neck* and in *both* arms. The neck wound was approximately 3 cm in length, over the right carotid area, exposing the external jugular vein. The *right* arm had a gaping wound with exposed musculature at the level of the radial aspect of the forearm just distal to the elbow. Mr. Shannon could not extend his right wrist or his right and little fingers. The *left* arm had three wounds, each approximately 1.5 to 1 cm in length. AER 73.

Mr. Shannon was taken by ambulance for emergency medical care. Under general anesthesia, Dr. Leonard Prutsok, M.D., a plastic surgeon, cleaned the wounds of grass and debris, extensively cut away damaged tissue, and attempted to repair four separate right arm lacerations, three measuring 3 cm and one measuring 1.5 cm. This included repairs of the extensor brachial radialis, extensor carpi radialis longus, extensor carpi radialis brevis, extensor digitorum communis, flexor digitorum superficialis, and neuroplasty of the median and radial nerves. Mr. Shannon's injuries were sutured and stapled and four Penrose drains were placed. Exhibit A to Mr. Shannon's original Opposition contains

the photographs of Mr. Shannon's mutilated right arm. AER 94. The wound exposing Mr. Shannon's jugular vein extended into the mid-portion of the sternocleidomastoid muscle. AER 73-74, 96-107.

Despite suitable antibiotic coverage, Mr. Shannon developed a severe infection with muscle necrosis. Dr. Prutsok operated again, sharply debriding the brachioradialis, the extensor carpi radialis, the lengua brevia and the flexor digitorum superficialis in part. AER 100-01.

On July 14, 1991, Mr. Shannon underwent his third operation, under general anesthesia. A skin graft was harvested from Mr. Shannon's thigh and applied to Mr. Shannon's gaping right forearm and elbow wound. AER 102-04.

Although treated with physical therapy, Mr. Shannon's symptoms did not improve and in September, 1991, he saw Dr. Alan C. Ivar, Qualified Medical Examiner, State of California, for right-sided neck, ear and jaw pain, right-sided headaches in the occipital region, pain in the right hand, thumb and wrist with abnormal kinematics of the right forearm, weakened right hand grip and "constant nightly nightmares of being attacked by a dog." AER 105-07.

Dr. Ivar found, *inter alia*, diminished cervical range of motion with pain in all ranges of motion, hypesthesia in the right arm, anesthesia to the area of the skin graft, significant weakness of the right wrist flexors and extensors, and significantly diminished right hand grip strength. Dr. Ivar placed Mr. Shannon on temporary total disability and referred him for neurological examination to rule out nerve impairment. Dr. Ivar recommended that Mr. Shannon be evaluated by a psychiatrist for this nightmares and concluded that Mr. Shannon "will undoubtedly have

permanent residual disability with regards to grip strength, wrist and hand movements of the right upper extremity." AER 106-07.

A photograph of Mr. Shannon's open wound to his right arm, part of the record on appeal, is at Appendix D-1. A photograph of the scarring, also part of the record on appeal, is at Appendix D-2.

The use of the dog to find and attack Mr. Shannon was in conformity with the policy of Santa Ana Chief Walters, Santa Ana Canine Supervisor Luna, and the City of Santa Ana. AER 287-88. It was also in conformity with the policy of Costa Mesa Chief Snowden, and the City of Costa Mesa. AER 222-23. Costa Mesa Sgt. Santee said that the injuries to Mr. Shannon did not surprise him and that the entire incident, including Shannon's reaction to the dog, was a "textbook case." AER 562-63.

2. Craig Brooks.

At about 2:00 p.m. on June 25, 1991, a dazed and incoherent Craig Brooks, obviously intoxicated and injured, was arrested by Irvine police for traffic violations, driving under the influence of alcohol, and grand theft auto. AER 294. Mr. Brooks was transported by ambulance for emergency treatment and taken for x-rays. Mr. Brooks, barefoot and wearing only his shorts, walked out of the hospital, hid in a bush and passed out. AER 297, 348, 349, 350-51A. Santa Ana canine supervisor Luna and Santa Ana dog handlers Bertagna and Letizio showed up with dogs. The officers claim they gave Santa Ana's standard "canine announcement" three times, waited two minutes, and began searching for Mr. Brooks. Bertagna's dog alerted to a bush. Without giving any further announcement, warning or opportunity to surrender, Bertagna permitted his dog to go into the bush and attack Mr. Brooks. AER 290-91. Bertagna heard Mr. Brooks

screaming, AER 291, claimed that dog pulled Mr. Brooks out of the bush, biting him in the buttocks, and that Mr. Brooks was trying to make the dog stop biting him by hitting and pulling at the dog. Bertagna told Mr. Brooks to "stop fighting with the dog and put his hands out in plain view." When Mr. Brooks did put his hands out in plain view, Bertagna grabbed the dog by the collar and called him off. AER 291. Mr. Brooks testified the dog bit him for 13 to 15 seconds. AER 356-57 [Brooks depo].

Mr. Brooks sustained multiple lacerations to his left thigh and buttocks, and extreme, painful ecchymosis (bruising), requiring suturing, a course of intravenous (Ancef) and oral (Keflex) antibiotics for five days, a tetanus shot, and pain medication. The sutures were removed after eight days. Mr. Brooks was treated with dressing changes for 20 days and received medical treatment for approximately 30 days. Mr. Brooks sustained permanent scarring. AER 354-55 [Depo], AER 599, 605, 607, 608, 609 [med. records].

This attack on Mr. Brooks was in conformity with the policy of the City of Santa Ana and approved by respondent Chief Paul Walters. AER 292.

3. Other Evidence.

Petitioners submitted substantial evidence on the training of police dogs, injuries the dogs inflict, law enforcement standards for the use of force, including sworn testimony from a Who's Who list in law enforcement. The Panel does not acknowledge this evidence, let alone discuss it.

The Medical Evidence

To show the risk of serious injury from police dog attacks, petitioners relied on a board certified general surgeon with special qualifications in surgical critical care, Peter C. Meade, M.D., in opposing respondents' motions for summary judgment. AER 85-93. Dr. Meade studied injuries inflicted by police dogs, including medical records of over 200 persons, photographs of over 300 people, the medical literature including "the most significant study ever published on the nature and severity of injuries caused by police dogs," AER 86, K. Snyder & M. Pentecost's article, *Clinical and Angiographic Findings in Extremity Arterial Injuries Secondary to Dog Bites*, ANNALS EMERGENCY MED., Sept. 1990, videotapes of police dogs attacking people, police studies of injuries, and testimony of police dog trainers and handlers, including the trainer of respondents' dogs (Adlerhorst Kennel's David Reaver). AER 85-87, ¶¶ 3A-H. He concluded that police dog attacks create a substantial risk of causing serious bodily injury or death. AER 87, ¶ 4. This is because of the dogs' size and aggressiveness, their " 'bite, crush and lacerate' " training, AER 88, ¶ 4B, their training to bite "*anyplace* on the body, including such vital areas as the genitals, neck, head, axilla (interior upper arm), popliteal area (behind the knee), distal one third of the medial thigh (front thigh)," AER 88-89, ¶4D, because "trained attack dogs can exert more than 450 PSI with their jaws, a pressure great enough to penetrate light sheet metal," AER 88, ¶4C, because the dog's training encourages it to "drive its teeth as deeply into the person's body as possible," AER 88, ¶4C, and to "rebite," and because people naturally try to avoid the "considerable pain" and "attempt to break free of the bite by pulling his or her arm, leg, or other portion of the body out of the dog's mouth." AER 89, ¶ 4F.

The Evidence Of Police Standards And Its Application To This Case

Petitioners submitted the declaration of VanNess Bogardus, a retired Los Angeles County Deputy Sheriff. Mr. Bogardus was one of two pilot canine handlers for the Sheriff's Department and served as a dog handler and trainer from June 1980, to November, 1986. Mr. Bogardus trained canine units for the Sheriff's Department and many local police departments as well as foreign governments. AER 123, ¶ 2.

Police dogs, according to Mr. Bogardus, are trained to bite and rebite any part of the body, as hard and as long as possible, with the entire mouth rather than with just the front incisors. AER 125, ¶ 12. People bitten by the dogs become frightened and try to protect themselves. Dog handlers must expect a person to panic, lose control and do anything to make the dog stop. People defecate and urinate in terror of the dog's attack.

"It is especially dangerous" to attack a person under the influence of alcohol. A person is likely to lose control and not respond to "stop fighting" the dog. People under the influence of alcohol are likely to be more seriously injured. AER 127, ¶ 16.

Regarding the attack on Mr. Shannon, Bogardus opined that "Letizio used force against Mr. Shannon in violation of accepted standards for the use of force." "Officer Letizio used force which was capable of killing Mr. Shannon and created a substantial risk of inflicting serious physical injury yet Letizio did not have probable cause to believe that Mr. Shannon posed a credible and immediate threat of death or serious injury to Letizio or others when he released the dog. Mr. Shannon was suspected of non-violent traffic infractions or possibly (at most) a non-violent misdemeanor (Cal. Veh. Code § 2800.1). There are no facts in any

of the reports indicating that any officer suspected or believed that Mr. Shannon was armed with a weapon or was physically dangerous. . . . He did not have a weapon nor does any officer report facts indicating that Mr. Shannon had a weapon. There are no facts indicating that Mr. Shannon threatened anybody. Had he made such threats which were observed or known by the officers, they would have reported it. . . . " AER 127-28, ¶ 17.

Mr. Bogardus also concluded that "[w]hen officer Bertagna allowed his dog to attack Mr. Brooks, Bertagna used force against Mr. Brooks in violation of accepted standards for the use of force." "Officer Bertagna used force which was capable of killing Mr. Brooks and created a substantial risk of inflicting serious physical injury yet . . . Mr. Brooks was suspected of traffic violations, driving under the influence, leaving the scene of an accident, and possibly grand theft auto . . . all considered non-violent crimes. Furthermore, Mr. Brooks was known not to be armed since he escaped from custody after a search wearing only his undershorts. Finally, Mr. Brooks was known to be intoxicated. There is nothing in any report reflecting any facts to show that Mr. Brooks had armed himself, or that any officer saw or heard anything which would lead a reasonable officer to that Mr. Brooks was armed with a weapon or was physically dangerous. . . . No officer reports Mr. Brooks as making a threatening gestures of any type toward any person." "Had he made such threats which were observed or known by the officers, they would have reported it." AER 129, ¶ 21.

Petitioners also relied on other authorities supportive of the opinions of Dr. Meade and Mr. Bogardus. They included

California POST standards[2]; the testimony of Southern California law enforcement officials including Los Angeles County Sheriff Sherman Block, LAPD Chief Willie L. Williams, and former LAPD Chief Daryl Gates, AER 335-36, 410, 581-93; testimony of the man who trained respondents' dogs (Adlerhorst Kennel's David Reaver), AER 521-43; the Kindle videotape, AER 126 [¶ 14], AER 313-14; high quality photographs of a representative sample of injuries inflicted by Adlerhorst-trained police dogs AER 662 [¶3], 667-735; and authoritative texts, AER 642-51.

Ninth Circuit Decision.

The Panel held that all the individual police officers (Chiefs Walters and Snowden, officers Letizio, Luna, Fleet, McCarthy, Durham and Santee) were entitled to qualified immunity as a matter of law. The Panel relied on the Ninth Circuit's earlier decision in *Chew v. Gates*, 27 F.3d 1432, 1447-49 (9th Cir. 1994), in which a divided court held that while the City of Los Angeles' use of dogs to attack and bite suspects may be unconstitutional, Los Angeles Chief of Police Daryl Gates and other officers were entitled to qualified immunity because it was not clearly established that using *dogs* to attack and mutilate people violated the Fourth Amendment. A-2, A-3, A-5.

Turning to the liability of the municipalities, the Panel assumed there was sufficient evidence that the dog attacks were pursuant to municipal policy. A-3, A-6 & n.2. Nevertheless, the

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[2] POST is the California Commission on Peace Officer Standards and Training, operated by the California Department of Justice. Cal. Penal Code § 13500. POST promulgates rules establishing minimum standards for the training of police officers. Cal. Penal Code § 13510. Police agencies that accept funding from POST must adhere to POST minimum standards. Cal. Penal Code § 13522.

Panel rejected petitioner Brooks' claim because, according to the Panel, "Brooks has not alleged a constitutional basis for his section 1983 claim." A-4, A-5. The Panel noted that neither *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), nor *Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985), resolved whether the Fourth Amendment applies to individuals like Mr. Brooks, *i.e.*, someone who was injured by police action *after* his arrest. Hence, the Panel contended Mr. Brooks did not carry his burden to demonstrate a Fourth Amendment violation. A-5.

As to petitioner Shannon, the Panel concluded that there was no constitutional violation because the officers were entitled, as a matter of law, to kill Mr. Shannon, *i.e.*, to use deadly force. "Shannon . . . was seen by police speeding and running red lights at 4:30 a.m., pulled up onto the lawn of a restaurant and fled from police on foot, climbing five fences (including three at the top), to hide in oleander bushes in the backyard of a house in a residential area." The Panel also claimed (incorrectly) that the dog handler Letizio "was told that Shannon had prior arrests for armed robbery."[3] A-7. Consequently, even though there were no fact upon which to believe Mr. Shannon was armed or dangerous, and

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[3] The Panel stated that the dog handler Letizio was informed that Mr. Shannon had had multiple arrests for armed robbery. A*. In his police report, however, Letizio referred to only <u>one</u> arrest for armed robbery. AER 172 (third paragraph). The Costs Mesa arrest package, the source of the information regarding Mr. Shannon that was broadcast, reflected only one prior arrest on an armed robbery charge. AER 219-20 (¶¶4-9).

The prior arrest for armed robbery was more than one year before the dog attack and concerned a robbery occurring more than two years before the June *, 1991 dog attack. The respondent officers had no information on the arrest's disposition (Mr. Shannon was released and never charged with any crime).

even though he was sought on traffic infractions only (speeding and running a red light), the prior arrest for armed robbery on May 31, 1989, meant that Mr. Shannon constituted an immediate threat of serious injury or death on June 29, 1991, the date of the dog attack. AER 219 at ¶6.

REASONS FOR GRANTING THE WRIT

1. The Court Should Hold That Police Officials Who Knowingly Use Weapons, *i.e.*, Attack Dogs, To Injure People Are Not Entitled To Qualified Immunity Merely Because The Courts Have Not Previously Held That The Serious Injuries Which Police Officials Know Or Should Know The Dogs Inflict, Are Serious Injuries.

In *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), this Court left open the question of the proper application, in an excessive force case, of qualified immunity. 490 U.S. at 399 n.12. The Court should grant review to resolve this critical question. Lower courts have been divided on whether, in an excessive force case, qualified immunity can be distinguished from a defense on the merits. *Compare Chew v. Gates*, 27 F.3d 1432 (9th Cir. 1994) (recognizing qualified immunity as a separate defense from the inquiry on the merits) *with Hopkins v. Andaya*, 958 F.2d 881, 885 n.3 (9th Cir. 1992) (holding that in excessive force cases, qualified immunity is the same inquiry as liability on the merits); *Street v. Parham*, 929 F.2d 537, 540 (10th Cir. 1991) (same).

Under the Ninth Circuit's decision in *Chew*, officials are encouraged to feign ignorance. Police officials are not liable for dog attacks because no *court* has ever told them that the dogs are likely to cause serious injury. 27 F.3d at 1446-47. Public officials, including police, have no claim to more specific "notice" of what

a deadly weapon is than ordinary citizens *charged with crimes*. No one *criminally charged* would get away with siccing a trained attack animal on another person by complaining that no *case* had previously held such attacks to be an assault with a deadly weapon,[4] even though the Constitution specially guarantees the criminally accused "fair notice that his contemplated conduct is forbidden." *United States v. Harriss*, 347 U.S. 612, 617, 74 S. Ct. 808 (1954). Every citizen is required to exercise a modicum of sound judgment. Public officials, especially the police, because of their training, experience and position, are no exception.

When respondents let the dogs attack petitioners, it was clearly established that the Fourth Amendment governed all seizures of free citizens by the police. *Graham v. Connor*, 490 U.S. 386, 395, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). *Any* force used was governed by *Graham v. Connor's* objective reasonableness standard. It was also clearly established by decisions of both this Court and lower courts that seizure by any means, including a police-sanctioned dog attack, was a "seizure" under the Fourth Amendment. *Brower v. County of Inyo*, 489 U.S. 593, 109 S.Ct. 1378, 103 L.Ed.2d 628 (1989) (police roadblock is Fourth Amendment seizure); *Kerr v. City of West Palm Beach*, 875 F.2d 1546 (11th Cir. 1989) (City of West Palm Beach policy permitting dogs to attack suspects violates Fourth Amendment);

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[4] *People v. Nealis*, 232 Cal. App. 3d Supp. 1, 3, 283 Cal. Rptr. 376, 378 (1991) (dog is deadly weapon); *State v. Sinks*, 168 Wis.2d 245, 483 N.W.2d 286, 289-90 (Wis. Ct. App. 1992) (Court holds that doberman pinscher is "likely to produce death or serious bodily harm" because "[i]t is common knowledge that dogs can inflict severe injury and can be instructed to attack."); *State v. Bowers*, 239 Kan. 417, 721 P.2d 268, 273-275 (1986). Indeed, just permitting a large dog to "lunge, jump and chomp at" a person at close range, is assault with a deadly weapon. *Michael v. State*, 160 Ga. App. 48, 286 S.E.2d 314 (1981).

Robinette v. Barnes, 854 F.2d 909 (6th Cir. 1988) (police dog attack analyzed under Fourth Amendment); *Marley v. City of Allentown*, 774 F. Supp. 343, 346 (E.D. Penn. 1991), *aff'd without opn.*, 961 F.2d 1567 (3rd Cir. 1992) (police dog attack may be considered "deadly force" under *Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985)). Furthermore, in 1985 this Court, in *Tennessee v. Garner*, clearly established that the police may not use deadly force to seize a person unless there exists probable cause that the suspect presents an immediate threat of death or serious injury. 471 U.S. at 11-12.

Qualified immunity should not be available. "In Fourth Amendment unreasonable force cases, unlike in other cases, the qualified immunity inquiry is the same as the inquiry made on the merits." *Hopkins v. Andaya*, 958 F.2d 881, 885 n.3 (9th Cir. 1992); *see also Street v. Parham*, 929 F.2d 537, 540 (10th Cir. 1991) ("determination of liability and the availability of qualified immunity depend on the same findings").

The Ninth Circuit's conclusion, in *Chew*, that police officers are entitled to immunity because there was no case holding that using dogs to attack people may violate the Fourth Amendment, is wrong. The courts' function is to determine the legal standards. Once those standards are clearly established, it is the responsibility of the police to recognize the facts that trigger the appropriate legal standard. The police cannot and should not rely upon appellate courts to engage in fact-finding missions in order to inform the police on an instrumentality's capacity to cause serious injury or death. This is particularly true here. Respondents, not the courts, have the first-hand knowledge of the capacity of police dogs to cause serious injury or death. Public officials should not reap the benefits of qualified immunity when they feign ignorance of obvious facts or bury their heads in the sand. *Little v. Walker*, .552 F.2d 193, 197 (7th Cir. 1977) ("official may not take solace

in ostracism").

This Court has long held that the reasonableness of a seizure will depend on its intrusiveness, and that intrusiveness is measured principally by the injuries likely to be inflicted. Therefore, it makes no difference whether those injuries are inflicted by guns, cars, knives, clubs, chokeholds, dogs, mountain lions or rattlesnakes. For police officials to argue that they can not be held responsible for the injuries *dogs* inflict because no *court* has ever told them that they will be held liable, is evidence of their irresponsibility. It brings to mind the admonition that "[i]t would create perverse incentives indeed if a qualified immunity defense could succeed against those types of claims that have not previously arisen because the behavior alleged is so egregious that no like case is on the books." *McDonald v. Haskins*, 966 F.2d 292, 295 (7th Cir. 1992).

Notwithstanding the foregoing, there may be an exception. In cases like this one where a lower level public employee, *e.g.*, a patrolman in a police paramilitary organization, is following the orders of superior officers, it may be both fair and prudent to recognize the existence of a narrowly limited "superior orders" "defense."[5] Organizations, especially paramilitary organizations, depend on subordinates' following orders. There is a difference in function, experience and responsibility between supervisors who give orders and subordinates who are expected, trained and paid to carry them out. Police chiefs should be more attuned to what is "clearly established law" and expected to exercise better judgment than lower level subordinates. The primary responsibility for bad policy decisions should not fall on the least culpable, the person at the low end of the chain of command.

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[5] Where the word "defense" is used in quotation marks, it refers to qualified immunity.

Of course, "superior orders" may *not* legitimately be considered a factor in determining whether force is constitutionally reasonable. Giving any weight at all to orders approving the use of force is antithetical to the basic structure of Fourth Amendment jurisprudence. It is inconsistent with this Court's mandate that Fourth Amendment seizures be judged "objectively," and creates a "Catch-22" that virtually eliminates any chance that a jury will ever find anyone, much less a responsible public entity or supervisor, liable for constitutional violations committed pursuant to an official policy or practice.

Graham v. Connor held that "the 'reasonableness' standard is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, *without regard to their underlying intent or motivation.*" *Id.* 490 U.S. at 397 (emphasis added). Reaffirming *Tennessee v. Garner, supra*, the Court restated the general rule that "[d]etermining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of " 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' " against the countervailing governmental interests at stake." *Graham v. Connor, supra,* 490 U.S. at 396. The particular factors to be considered include the "severity of the crime," whether the suspect "poses an immediate threat to the safety of the officers or others," and whether he is "actively resisting arrest or attempting to evade arrest by flight." *Id.* at 396.

Absent from the foregoing analysis of objective reasonableness in is *any* factor which could reasonably be equated with "following orders." As a result, under the "objective reasonableness" standard, the Fourth Amendment should afford the same protections in Alabama and Arizona, Boyle Heights and Brentwood, regardless of the good or bad training an individual

officer has received. The Court's determination that only "objectively" reasonable force may be used requires the utilization of standards independent of the training of a particular officer and the policies and practices of a particular unit or department. For example, that an officer has been instructed to shoot all fleeing felons, regardless of risk, should not be admissible as evidence that it was "objectively reasonable" for that officer to shoot an unarmed fleeing felon in violation of *Tennessee v. Garner*. Thus, the question is not whether a particular officer acted reasonably in following the particular training he or she was given by superiors; it is whether the force used was reasonable. In short, the value of lower-ranking police following superiors' orders has never been recognized as a basis for upholding the constitutionality of police action which infringes on an individual's Fourth Amendment interests.

But as a practical matter officers enjoy a *de facto* "following orders" "defense." "[J]urors' general sense of fairness mitigates against blaming an officer for causing a constitutional injury when he merely carried out department policy as an obedient employee." Colbert, *Bifurcation of Civil Rights Defendants: Undermining Monell in Police Brutality Cases*, 44 HAST. L.J. 499, 548 (1993). Even United States Nuremberg Chief of Counsel for War Crimes, General Telford Tyler, believed that "Article 8 of the Charter, providing that obedience to a superior's command to commit a crime should be considered only in mitigation . . . is flawed. If the defendant did not know, and had no basis for knowing, that the order he had obeyed was unlawful, the defendant should not be held liable at all." Telford Taylor, *The Anatomy of the Nuremberg Trial* 630 (1992). Moreover, the jury may believe the "absent tort-feasor [the employer or supervisor] the wrongdoer." 9 Wright & Miller, *Federal Practice and Procedure*, note 182, § 2388, at 293 (1972). "In this situation, a jury that believes that the plaintiff suffered a

constitutional injury would likely sympathize with the plight of the individual officer and find in her favor, believing that the municipality would be held accountable for the unlawful practice it maintained." Colbert, *supra*, 44 HAST. L.J. at 543. Therefore, recognizing "superior orders" as an "extraordinary circumstance," *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), justifying qualified immunity would merely reflect reality.

A subordinate officer like petitioners Letizio and Bertana, the dog handlers, should not, though, enjoy immunity merely because they followed orders. As the Nuremberg experience exemplifies, the immunity must be narrow. While the dog handlers are certainly less culpable than the chiefs of police (Walters and Snowden), they are not without fault. The dog handlers should have known, despite their superiors' approvals, that what they were doing was wrong. The use of dogs to attack people is premised on the factually untrue assumption that they are not reasonably capable of inflicting serious injury or death. The dog handlers must have know better. They trained with the dogs, used the dogs, and must have saw what they did. Given the handlers' first hand experience, they had to realize the severity of the injuries the animal would likely inflict. That they were told that a police dog was not likely to inflict serious injuries when it attacked did not permit the handlers to ignore what they knew to be the truth from they own experience.

The factual question upon which handlers' entitlement to immunity should hinge is whether they knew. If they did not know and were merely following orders in ignorance, they should be entitled to qualified immunity. On the record presented to the trial court, however, that question can not be resolved in the handlers' favor. The handlers' motions for summary judgment should have been denied.

2. The Court Should Grant Review To Resolve A Conflict Among The Circuits On Whether *Graham v. Connor* Applies To Pretrial Arrestees.

Well before the dog attack, petitioner Brooks had been arrested and placed in police custody. The Panel decision correctly noted that this Court has not decided whether the Fourth Amendment applies to pretrial arrestees. A-4. Lower courts are divided. In *Hammer v. Gross*, 932 F.2d 842 (9th Cir. 1991) (en banc), the Ninth Circuit held that as to a pretrial detainee who alleged that police officers used excessive force in extracting blood, "the right in issue arises under the Fourth Amendment." 932 F.2d at 845. Similarly, the Second and Tenth Circuits hold that the *Graham* test applies in the period between the initial arrest and the initial court appearance. *Frohmader v. Wayne*, 958 F.2d 1024 (10th Cir. 1992); *Powell v. Gardner*, 891 F.2d 1039 (2nd Cir. 1989). But the Fifth and Seventh Circuits disagree, holding that a person claiming excessive force while in custody but before conviction must show a violation of his Eighth Amendment rights. *Rankin v. Klevenhagen*, 5 F.3d 103, 105-06 (5th Cir. 1993); *Wilkins v. May*, 872 F.2d 190 (7th Cir. 1989) (In the period between arrest and detention, a substantive due process analysis governs). Thus, continued controversy may be expected until this Court settles the point.

3. This Court Should Decide Whether, Under The Fourth Amendment, A Person Lawfully Arrested Retains His Right Of Self-Defense Against Excessive Force.

Both Thomas Shannon and Craig Brooks tried to stop the dogs' initial attacks by fending off and striking the dog. Petitioners' injuries (particularly those of Mr. Shannon) were probably aggravated by their unsuccessful efforts to defend against the dogs' attacks. Respondents seized upon these facts to blame petitioners for their injuries, arguing that they should have become passive when attacked instead of "fighting with the dog." At least one district court employed similar reasoning in concluding that police officers committed no constitutional violation when they use a police dog to attack a robbery suspect. *Kopf v. Wing*, 942 F.2d 265, 268 (4th Cir. 1991) ("The [district] court faulted Casella for fighting with the dog rather than surrendering.").

This Court has never decided whether a person has a constitutional right of self-defense against excessive force. The issue, though, is important. The natural reaction of *anyone* -- even "suspects" -- will be to protect oneself from the dog's attack:

> Upon being bitten by a dog, a suspect usually attempts to free himself; the dog, however, is trained to maintain his hold on the suspect until ordered to release the suspect by its handler. Thus, if a dog should lose his hold as a result of the suspect's attempts to free himself, the dog will seek to reestablish it. As a result, suspects often suffer serious injury from multiple bites received during the course of an apprehension.
> *Kerr v. City of West Palm Beach*, 875 F.2d 1546, 1550 (11th Cir. 1989).

Thus, anytime a police dog attacks the person will probably try to defend himself. *Chew v. Gates*, 27 F.3d 1432, 1441 n.7 (9th Cir. 1994) ("Given the violent nature of [the dog's] attack on Chew, and considering the fact that [the police dog] was still engaged in biting him when the officers came upon the scene, it is not surprising that Chew was responding by hitting the dog with a metal pipe."); *Kopf v. Wing*, 942 F.2d 265, 268 (4th Cir. 1991) (Fourth Circuit held that a "jury could find it objectively unreasonable to require someone to put his hands up and calmly surrender while a police dog bites his scrotum.").

The Fourth Amendment *should* guarantee a person's right to defend himself from invasive and unreasonable mutilations like those caused by dog attacks. "[T]he integrity of an individual's person is a cherished value of our society." *Schmerber v. California*, 384 U.S. 757, 772, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966)). "A crucial factor in analyzing the magnitude of the intrusion . . . is the extent to which the procedure may threaten the safety or health of the individual." *Winston v. Lee*, 470 U.S. 753, 761, 105 S.Ct. 1611, 84 L.Ed.2d 662 (1985). Consequently, "the Fourth Amendment's command that searches be 'reasonable' requires that when the State seeks to intrude upon an area in which our society recognizes a significantly heightened privacy interest, a more substantial justification is required to make the search 'reasonable.' " *Winston v. Lee*, *supra*, 470 U.S. at 767. No wonder that the "nature and quality of the intrusion," *Graham v. Connor*, *supra*, 490 U.S. at 386, is at the heart of the protection afforded by the Fourth Amendment.

California law, consistent with that in other jurisdictions, has long recognized the rule that suspects, even though lawfully arrested, retain their right of self defense as to any excessive force. *People v. Curtis*, 70 Cal. 2d 347, 357, 74 Cal. Rptr. 713, 719, 450 P.2d 33 (1969) (California Supreme Court holds that a suspect,

even though he is lawfully under arrest, may still "use reasonable force to defend life and limb against excessive force.").

The same rule ought to apply under the Fourth Amendment. Large, aggressive animals terrify people.[6] ASER 586-87, ¶¶15, 16. Permitting a police dog to attack a person may be "subhuman and vicarious animalism," *Miller v. United States*, 404 F.2d 611, 612 (5th Cir. 1968), because animal attacks evoke primal fear. Afraid of being eaten, people become hysterical. Thus, a police officer should expect that a person may try to defend himself from the dog's attack. After all, whether armed with gun, dog or club, the identity of its user will have no relationship to the injuries inflicted. The bodily tissues which are penetrated, ripped or destroyed, know not whether the dog was the "Hound of the Baskervilles" or a "trained police dog." Infection is infection; damaged arteries are damaged arteries; pain is pain.

4. The Court Should Grant Review And Hold That The Reasonableness of Police Seizures May Not Be Adjudicated In A Vacuum, But Must Be Considered In Light Of Evidence Of Their Actual Reasonableness, Including Evidence From Police Practices Experts Regarding Law Enforcement Standards.

This case raises a primary question: what information should the courts consider in deciding the "reasonableness" of police conduct? Petitioners offered substantial evidence that the dog attacks violated police use of force standards, including the police standard on lethal force. *See, e.g.*, AER 76-77 [¶¶10-11];

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[6] It is this quality which makes dogs a useful police tool. "Nothing 'cools' a potentially violent situation more quickly than the sight of police canine." INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, TRAINING KEY # 238, *Police Dogs*, ASER 260.

AER 115-16 [P.O.S.T. standards]; AER 125 [¶¶10, 11], 127-29 [¶¶17-18, 21-22]. The Panel, after briefing mentioning the Meade and Bogardus declarations, stated simply that they were "insufficient to withstand summary judgment." A-10. There was no further discussion.

The Panel should not have blithely disregarded the expert declarations. Actual *evidence*, including the knowledge and experience of qualified law enforcement professionals, may be offered and should be considered in deciding how law enforcement professionals should act. Neither juries nor judges necessarily possess, as a matter of law, all of the information relevant to determining disputes involving the reasonableness of police actions. Just like medicine, engineering, auto mechanics, or any other field, law enforcement is a profession involving a substantial degree of specialized education, training and experience which is not common knowledge. The reality of police work is not necessarily reflected in "Dragnet," "Hill Street Blues," or "Cops." People go to police academies to be trained to be police officers. The State of California sets standards -- P.O.S.T.[7] -- for the training of law enforcement officers. Law enforcement professionals frequently give expert opinion testimony about the conduct of other law enforcement professionals. Although, due to the selection process, many judicial officers come from prosecutorial backgrounds, this does not necessarily qualify all judges to determine the reasonableness of police actions, without reference to any evidence, including evidence from law enforcement

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[7] According to Cal. Penal Code § 13510, California POST "shall adopt, and may from time to time amend, rules establishing minimum standards for training of city police officers." Under California law, any law enforcement agency that receives funding from POST must certify that the agency "will adhere to the standards for recruitment and training established by the commission." Cal. Penal Code § 13522.

professionals.

In *Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985), this Court observed that "Actual departmental policies are important" in determining what is " 'unreasonable' " under the Fourth Amendment. 471 U.S. at 19. Reasonableness should be "viewed in light of the policies adopted by the police departments themselves." 471 U.S. at 18. Police conduct which violates state standards is not reasonable. *Reed v. Hoy*, 909 F.2d 324, 330 n.5 (9th Cir. 1989) (Police action that violates state law standards may be unreasonable under the Fourth Amendment.)

Had petitioners' evidence been offered to a jury to support their claims, the jury could rely upon it. F.R.E. Rules 702, 703, 704; *Davis v. Mason County*, 927 F.2d 1473, 1484-85 (9th Cir. 1991); *Cabrales v. County of Los Angeles*, 864 F.2d 1454, 1460 (9th Cir. 1988); *Zuchel v. City and County of Denver, Colo.*, 997 F.2d 730, 742-43 (10th Cir. 1993). Indeed, the Fourth Circuit *reversed* the trial court for precluding plaintiff from calling police practices experts in a police dog bite case to show that the officers violated police standards. *Kopf v. Skyrm*, 993 F.2d 374, 379 (4th Cir. 1993). The Panel's refusal in this case to even acknowledge plaintiffs' evidence is inexcusable.

Since the decision in *Graham*, *all* uses of force must be analyzed "objectively." Therefore, the question is *not*, does the defendant before the court believe he acted properly but rather, would an objectively reasonable officer so believe. Absent expert testimony on standards within law enforcement and their application to the case at hand, it may be impossible for a plaintiff to challenge a defendant officer's self-serving claim that his actions were objectively reasonable.

Police dog bite litigation in the Central District of

California epitomizes this problem. Thousands of people have been needlessly mutilated,[8] often sadistically,[9] by police dogs. Handlers have been instructed that siccing a "trained" 85-pound German Shepherd on a human being is okay because it will probably reduce the level of violence and is not likely to inflict

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[8] *See generally*, G. M. Bush, *Litigation Over Police-Dog Attacks Gains Some Bite*, Los Angeles Daily Journal, Nov. 26, 1990, at 1.

[9] The sadistic use of dogs to brutalize people has a long, bloody history. The European conquerors used dogs extensively to exterminate the peoples of the New World. J.G. and J.J. Varner, *Dogs of the Conquest* (U. Oklahoma Press 1983). As reported in *Moran v. Davis*, 18 Ga. 722 (1855), in 1852 the State of Georgia found it necessary to specifically prohibit owners, hirers and overseers of slaves from "unnecessarily biting or tearing [slaves] with dogs." *Id.* at 724. A war crimes tribunal tried and hanged Confederate Captain Henry Wirz for his use of dogs to mutilate escaped prisoners. N.P. Chipman, *The Tragedy of Andersonville, Trial of Captain Henry Wirz -- The Prison Keeper* (1911) at 410-412, *reprinted as The Andersonville Prison Trial* (1990) ("The tracking hounds would have been sufficient to discover the prisoners, and as they are usually harmless, would have served the purpose of the pursuer and at the same time inflicted no injury upon the pursued.") The Nazi extermination camp Treblinka is remembered in the nightmares of its few survivors not just for its gas chambers. Addicted to the infliction of human suffering, guards deployed Kommandant Franz Stangl's dog "Bari" "to attack people, and specifically their genital regions, on command" as they were herded naked down the chute to their doom at the hands of "Ivan the Terrible." Sereny, *Into That Darkness* -- An Examination of Conscience 202 (1974). *See also Miller v. United States*, 404 F.2d 611, 612 (5th Cir. 1968), wherein the Fifth Circuit affirmed the criminal conviction of two deputies for causing a police dog to attack a prisoner to extract a confession. The court described the deputies' conduct as "subhuman and vicarious animalism."

serious injuries.[10] The evidence is overwhelmingly the opposite. Dogs regularly inflict serious injuries[11] and *provoke* needless violence. Yet the courts, ignorant of reality and apparently relying on "Lassie" reruns and wishful thinking, are unwilling to consider any evidence in conflict with their erroneous preconceptions. But without considering the evidence, in particular properly qualified expert testimony, the problem will continue. The constitutionality of the policy may never be tested. Unconstitutional policies will go unchecked. Civil unrest may result.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

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DONALD W. COOK
Attorneys for Petitioners

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[10] The consequences of permitting officers to use force is that it will be used. The uninitiated have no conception of the forces which motivate police to hurt people. *See* Jerome H. Skolnick, James J. Fyfe, *Above the Law, Police and the Excessive Use of Force*, 10-11 (1993); Paul Chevigny, *Police Power: Police Abuses in New York City*, 136 (1969).

[11] *See, e.g.*, K. Snyder's & M. Pentecost, *Clinical and Angiographic Findings in Extremity Arterial Injuries Secondary to Dog Bites*, ANNALS EMERGENCY MED., Sept. 1990 (Doctors at County-USC Medical Center conclude that police dogs frequently inflict serious injuries).

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 93-56542
D.C. No. CV-92-00533-LHM (C
MEMORANDUM*

FILED
FEB 3 1995
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

THOMAS SHANNON; CRAIG BROOKS,

Plaintiffs-Appellees,

v.

CITY OF COSTA MESA; CITY OF SANTA ANA; PAUL WALTERS, Chief of Police of the Santa Ana Police Department; RAUL LUNA; MICHAEL FLEET; ANTHONY BERTAGNA; WILLIAM LETIZIO; DAVE SNOWDEN; PAUL MCCARTHY; ROBERT DURHAM; BURTON SANTEE,

Defendants-Appellees

Appeal from the United States District Court
for the Central District of California
Linda H. McLaughlin, District Judge, Presiding

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Argued August 3, 1994
Pasadena, California
Submission Deferred August 3, 1994
Resubmitted January 5, 1995

Before: O'SCANNLAIN and T.G. NELSON, Circuit Judges, and MERHIGE,** District Judge

The parties are familiar with the facts, so we need not recite them here. This appeal involves two separate cases, essentially treated by Thomas Shannon and Craig Brooks as a single case despite a district court ordering the two cases severed. The alleged civil rights violations of the two plaintiffs involved different facts, circumstances, and incidents which occurred on two different days. Santa Ana police officers were involved in both cases. Costa Mesa police officers were involved in only the Shannon case.

Brooks

Officers Bertagna, Fleet, and Luna are entitled to qualified immunity. At the time of this incident, the law was not clearly established such that reasonable officers would have known that their actions in deploying a dog and assisting in the canine search for a felony hit-and-run arrestee, who escaped from custody while at a hospital and hid in foliage near a construction zone, violated a clearly established right. See Chew v. Gates, 27 F.3d 1432, 1447-49 (9th Cir. 1994), petition for cert. filed, 63 U.S.L.W. 3463 (U.S. Nov. 28, 1994) (No. 94-980); see also Mitchell v. Forsyth, 472 U.S. 511, 528, 535 (1985); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Brooks has not alleged the type of

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** Honorable Robert R. Merhige, Jr., Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

circumstances or conduct involving use of a police dog that would violate clearly established law. See Chew, 27 F.3d at 1448-49 (citing Mendoza v. Block, 27 F.3d 1357, 1362 (9th Cir. 1994) (giving example of officer siccing dog on handcuffed arrestee)).

Santa Ana Police Chief Walters is also entitled to qualified immunity. See Chew, 27 F.3d at 1446-50. Chew evaluated the issue of qualified immunity under the assumption that the "departmental policy authorized the use against all concealed suspects of dogs trained to search for and apprehend persons by biting and seizing them." Id. at 1446. In this case, Brooks was not just a concealed suspect; he was an escaped and concealed arrestee.

The City of Santa Ana, of course, would not be entitled to a qualified immunity defense. Chew, 27 F.3d at 1439. To prevail on a claim against the City of Santa Ana, Brooks mush show: (1) the officers violated his constitutional rights, and (2) the City's policy caused the violation. Monell v. New York City Dep't of Social Servs., 436 U.S. 658, 690-92 (1978). Even assuming sufficient evidence of the actual municipal policy at issue here,[1] Brooks has not demonstrated that he was deprived of federally protected rights. See 42 U.S. C. § 1983. He contends that

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1 A copy of the Santa Ana Canine Policy was included in plaintiffs' belatedly filed "Index and Excerpts of Testimony and Relevant Reports in Opposition to Motion for Summary Judgment." The district court refused to consider these belatedly filed documents. The court's refusal to consider these documents is "not specifically and distinctly raised and argued" in the opening brief, and will therefore not be considered on appeal. Officers for Justice v. Civil Serv. Comm'n, 979 F.2d 721, 726 (9th Cir. 1992), cert. denied, 113 S. Ct. 1645 (1993).

his Fourth Amendment rights have been violated and that he was not afforded the constitutional protections necessary under Graham v. Connor, 490 U.S. 386 (1989), and Tennessee v. Garner, 471 U.S. 1 (1985).

However, neither of these cases resolved the question of "whether the Fourth Amendment continues to provide individuals with protection against the deliberate use of excessive physical force beyond the point at which arrest ends and pretrial detention begins." Graham, 490 U.S. at 396 n.10. Graham applies to claims "aris[ing] in the context of an arrest or investigatory stop of a free citizen." Id. at 394 (emphasis added); see also id. at 395 n.10. In Garner, police shot and killed a suspect who did not appear to be armed to prevent his escape from the scene of a burglary. 471 U.S. at 4. The use of the dog occurred in this case after Brooks had been arrested, after he escaped from police custody in the hospital, but prior to pretrial detention. Brooks has not alleged that he was subjected to excessive force amounting to punishment. See Graham, 490 U.S. at 395 n. 10. Nor has he made any argument that addresses the factual distinction between his case and the prearrest situations in Graham and Garner.

"[Section] 1983 is not itself a source of substantive rights, but merely provides a method for vindicating federal rights elsewhere conferred." Graham, 490 U.S. at 393-94 (internal quotations omitted). The Fourth Amendment analyses in Graham and Garner do not confer federal rights on Brooks, an escaped felony arrestee, that can serve as a basis for Monell liability. Compare Chew, 27 F.3d at 1439-43; cf. Robins v. Harum, 773 F.2d 1004, 1009-10 (9th Cir. 1985) (a pre-Graham case which held that excessive force by law enforcement official in the course of transporting an arrestee gives rise to a section 1983 claim based upon a Fourth Amendment violation).

Brooks has not alleged a constitutional basis for his section 1983 claim. There is no basis, therefore, for the imposition of Monell liability on the City of Santa Ana. See Monell, 436 U.S. at 690-92; see also Los Angeles v. Heller, 475 U.S. 796, 799 (1986) ("If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point.").

The district court properly granted summary judgment in favor of Officers Bertagna, Fleet, Luna, Chief Richardson and the City of Santa Ana.

Shannon

Even if the district court erred in granting summary judgment to Santa Ana Officers Letizio and Luna "without notice," because the notice of motion was amended to name the individual officers after Shannon had filed his opposition papers, we affirm the order. Officer Luna, who is in charge of the Santa Ana canine program, and who is alleged in Shannon's complaint to have been involved in adopting the policy, is entitled to qualified immunity just as was Captain McKinley in Chew, who had overall supervisory responsibility for the L.A.P.D. canine program. Chew, 27 F.3d at 1446. Officer Letizio, the canine handler, is entitled to qualified immunity because the law governing his conduct was not clearly established at the time of Shannon's arrest. Id. at 1447-50. Shannon has not alleged the type of circumstances or conduct that would violate clearly established law. See Chew, 27 F.3d at 1448-49. We note that although the district court granted summary judgment to Officers Fleet and Bertagna as well, these officers were not named in Shannon's Third Amended Complaint.

Santa Ana Police Chief Walters is immune from suit under the qualified immunity doctrine. Chew, 27 F.3d at

1446-50. This leaves the question of the liability of the City of Santa Ana. Even assuming adequate evidence of the actual policy at issue in this case,[2] application of the Graham factors supported the decision to use canine force to arrest Shannon. Cf. Chew, 27 F.3d at 1441-43.

In determining whether the use of force to effect a seizure is reasonable, "the nature and quality of the intrusion on the individual's interests" must be balanced against "the countervailing government interests at stake." Graham, 490 U.S. at 396 (internal quotation omitted); see also Chew, 27 F.3d at 1440. Three factors are considered in weighing the governmental interests involved: (1) "the severity of the crime at issue," (2) "whether the suspect poses an immediate threat to the safety of the officers or others," and (3) "whether he is actively resisting arrest or attempting to evade arrest by flight." Graham, 490 U.S. at 396 (citing Garner, 471 U.S. at 8-9).

These factors "are not to be considered in a vacuum but only in relation to the amount of force used to effect a particular seizure." Chew, 27 F.3d at 1441. In Chew, we considered but did not decide whether the use of dogs trained to bite and seize amounts to deadly force. Id. at 1435, 1442. If such use does amount to deadly force, it might be unconstitutional to employ dogs in circumstances like those in Garner. 471 U.S. at 3; see also Chew, 27 F.3d at 1452-53 (Norris, J., concurring in part and dissenting in part). The

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[2] See n.1, supra. Shannon also points out that in response to requests for admission, the City of Costa Mesa stated that the use of the dog to find and bite him was in accordance with the policies and practices of the City of Costa Mesa Police Department and pursuant to the authorization and directives of Costa Mesa Police Chief Snowden and Santa Ana Police Chief Walters.

facts before us, however, are unlike those of Garner or Graham.

Shannon, who was seen by police speeding and running red lights at 4:30 a.m., pulled up onto the lawn of a restaurant and fled from police on foot, climbing five fences (including three that were between six and eight feet high and one that was barbed at the top), to hide in oleander bushes in the backyard of a house in a residential area. Construing the evidence in the light most favorable to Shannon, Santa Ana Officer Letizio was not informed about the outstanding warrants, or the nature of the warrants. However, the record reveals that it was undisputed that Letizio was told that Shannon had prior arrests for armed robbery. The Declaration of Robert Mann, relied upon for the assertion that this fact was disputed, speaks to Letizio's alleged knowledge of the warrants, not the armed robbery arrests.

"Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." Garner, 471 U.S. at 11. Even assuming that the use of dogs trained to bite and seize constitutes the use of deadly force, we hold that the use of the dog in this case, by officers wishing to prevent harm to themselves and residents in the area, was objectively reasonable.

Review of the Graham factors leads to the same conclusion. The most important element, "whether the suspect poses an immediate threat to the safety of the officers or others," Chew, 27 F.3d at 1441, weighs against Shannon. Although Shannon, like Chew, was initially stopped for a traffic violation, Chew stopped for police, produced his driver's license, and spoke with police before his flight. Id. at 1442. As described above, Shannon's situation was different. Furthermore, Shannon hid in a residential

backyard, not a commercial junkyard. The safety of residents of the area also had to be considered. Unlike the situation in Chew, there is no material fact question about the immediate safety threat posed by Shannon. Compare id.

The other two Graham factors also weigh in favor of the government. As in Chew, an edge goes to the government on whether Shannon was "actively resisting arrest" when he hid in the bushes and did not come out after a canine announcement. See id. When looked at in isolation, the severity of the crime (speeding and running red lights) seems somewhat minimal. However, there was also Shannon's immediate and somewhat elaborate flight, as well as the information given to Letizio that Shannon had been arrested for armed robbery.

We conclude that in Shannon's case it is appropriate to determine as a matter of law that it was reasonable for Officer Letizio to release the dog. Accordingly, there is no basis for Monell liability to be imposed upon the City of Santa Ana. Monell, 436 U.S. at 690-92; Heller, 475 U.S. at 799. The district court's grant of summary judgment to the City of Santa Ana is affirmed.

Shannon filed his opposition to the summary judgment motion of the Costa Mesa defendants three days late. The district court granted the summary judgment motion on the ground that Shannon filed no opposition. Summary judgment is not an acceptable sanction for failure to abide by a local rule. Marshall v. Gates, No. 93-55022, slip op. at 105-06 (9th Cir. Jan. 4, 1995). However, unlike Chief Gates' papers in Marshall, the Costa Mesa defendants met their burden of demonstrating an absence of genuine issues for trial. Id. at 106. We therefore affirm the grant of summary judgment to the Costa Mesa defendants.

Costa Mesa Police Sergeant Santee, who requested a Santa Ana canine officer and who Shannon also contends had

a duty to intervene in the dog attack, is entitled to qualified immunity. The law governing his conduct was not clearly established at the time of Shannon's arrest. Chew, 27 F.3d at 1447-50. Officer McCarthy, who initially followed Shannon on foot and who Shannon contends had a duty to intervene in the dog attack, is also entitled to qualified immunity. Id.

To the extent that Shannon alleges that Sergeant Durham authorized, caused and/or permitted the use of the dog, he is entitled to qualified immunity. Id. Shannon also predicated Durham's liability on his alleged fabrication of Shannon's criminal history and the broadcast of this information to the officers in the field. However, while Shannon's opposition attempted to set forth many factual questions concerning Shannon's "arrest package," it failed to support the fabrication claim, or the claim that Shannon's prior history was unknown to officers at the time the dog was used to search for him. Shannon failed to meet his summary judgment burden on this point, see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986), and Durham is entitled to summary judgment.

Costa Mesa Police Chief Snowden is entitled to qualified immunity. Chew, 27 F.3d at 1446-50. Because there is no basis for Monell liability to be imposed upon the City of Santa Ana, there is no basis for such liability to be imposed upon the City of Costa Mesa.

The Declarations and The State Law Claims

Even if the district court erred in concluding that the declarations of Peter Meade, M.D., and VanNess Bogardus, II, were inadmissible, they are insufficient to withstand the summary judgment motions in these cases.

Under the circumstances, it is not necessary to remand the dismissal of the state law claims to the district court for a reexamination of the four categories enumerated in 28

U.S.C. § 1367(c) in accordance with Executive Software N. Am., Inc. v. United States Dist. Ct., 24 F.3d 1545 (9th Cir. 1994). First of all, the district court properly dismissed all claims over which it had original jurisdiction. See 28 U.S.C. § 1367(c) (3). To require a remand for the court to specify subsection 1367(c) (3) as a specific ground for dismissal based on Executive Software (decided after the district court's order in these cases), would elevate form over substance. More importantly, the district court properly dismissed the state law claims without prejudice because they were insufficiently pleaded. Although Shannon and Brooks contended at oral argument that they should have been given leave to amend, they did not make this argument in their opening brief. The issue is therefore waived. Officers for Justice v. Civil Serv. Comm'n, 979 F.2d 721, 726 (9th Cir. 1992), cert. denied, 113 S. Ct. 1645 (1993).

CONCLUSION

We have considered the other arguments made by the appellants and conclude that no discussion is necessary. The summary judgments in favor of the defendants in the cases brought by Brooks and Shannon are AFFIRMED.

AFFIRMED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 93-56542
D.C. No. CV-92-00533-LHM (C
ORDER

FILED
MAR 22 1995
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

THOMAS SHANNON; CRAIG BROOKS,

Plaintiffs-Appellees,

v.

CITY OF COSTA MESA; CITY OF SANTA ANA; PAUL WALTERS, Chief of Police of the Santa Ana Police Department; RAUL LUNA; MICHAEL FLEET; ANTHONY BERTAGNA; WILLIAM LETIZIO; DAVE SNOWDEN; PAUL MCCARTHY; ROBERT DURHAM; BURTON SANTEE,

Defendants-Appellees.

Before: O'SCANNLAIN, T.G. NELSON, Circuit Judges, and MERHIGE,* District Judge.

Judges O'Scannlain, T.G. Nelson and Merhige vote to deny the petition for rehearing. Judges O'Scannlain and T.G. Nelson vote and to reject the suggestion for rehearing en banc, and Judge Merhige so recommends.

The full court was advised of the suggestion for rehearing en banc and no active judge requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Further, appellee City of Santa Ana's request to publish the disposition in this matter is denied.

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*Honorable Robert R. Merhige, Jr., Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

UNITED STATES DISTRICT COURT

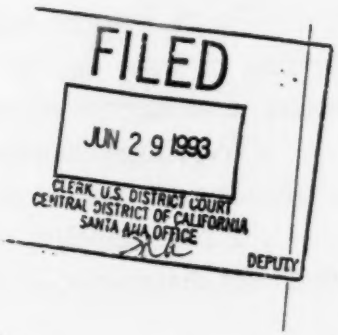
CENTRAL DISTRICT OF CALIFORNIA

Case No. 92-3397 LHM (JRx)

CRAIG BROOKS,

Plaintiff,

vs.



CITY OF COSTA MESA, et al.,

Defendants

ORDER GRANTING SUMMARY JUDGMENT

The motion of Defendants, CITY OF SANTA ANA and CHIEF PAUL WALTERS, for summary judgment against Plaintiff Brooks, after considering the moving and opposition presented to the Court, IT IS HEREBY ORDERED THAT the motion is GRANTED. Minute Order of 6/29/93 is incorporated herein.
DATED: 6/29/93

/s/ McLaughin

United States District Judge

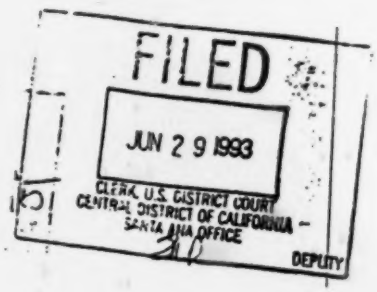
UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Case No. 92-3397 LHM (JRx)

THOMAS KEITH SHANNON,

Plaintiff,



vs.

CITY OF COSTA MESA, et al.,

Defendants

ORDER GRANTING SUMMARY JUDGMENT

The motion of Defendants, CITY OF SANTA ANA and CHIEF PAUL WALTERS, for summary judgment on the First Cause of Action and all defendants on the Second Cause of Action against Plaintiff Shannon, after considering the moving and opposition presented to the Court, IT IS HEREBY ORDERED THAT the motion is GRANTED. Minute Order of 6/29/93 is incorporated herein.

DATED: 6/29/93

/s/ McLaughin

United States District Judge

APX. D-1

APX. D-2

No. 94-2097

Supreme Court, U.S.
FILED
JUL 18 1995
CLERK

In The

Supreme Court of the United States

October Term, 1995

THOMAS SHANNON and CRAIG BROOKS,

Petitioners,

vs.

CITY OF COSTA MESA, et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO WRIT OF CERTIORARI CITY OF COSTA MESA, CHIEF DAVID SNOWDEN, SGT. DURHAM, SGT. SANTEE AND OFFICER McCARTHY

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion in granting Respondents' motion for summary judgment.

2. Whether the district court abused its discretion in denying Petitioner Shannon's Motion for Relief pursuant to F.R.C.P. 59 and 60.

3. Whether Respondents' motion for summary judgment should be affirmed as no genuine issue of material fact exists.

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STATEMENT OF THE CASE

1. Nature of the Case.

Petitioner Shannon was arrested on June 29, 1991, in the City of Costa Mesa (AER 1). Costa Mesa Police Officer McCarthy was driving in a marked police car at approximately 4:26 a.m. when he observed Petitioner driving a car at a high rate of speed and running red lights (AER 166). Thereafter, Petitioner drove up onto the grass in front of a Deli and exited the car (AER 166). Officer McCarthy yelled "stop – police". Petitioner did not comply and, instead, ran westbound to the rear of the Deli (AER 166). Officer McCarthy pursued Petitioner on foot, again yelling "stop – police" (AER 160). Petitioner climbed over a six foot high wooden fence and into a drainage ditch (AER 166). He then climbed a six foot high chain link fence which had barbed wire on top (AER 167). Petitioner proceeded to climb over a wrought-iron gate, approximately seven to eight feet tall with pointed spikes on top (AER 167). Officer McCarthy observed Petitioner on top of a block wall fence before he dropped over into the backyard of the residence at 2820 Drake Street (AER 167).

Officer McCarthy discontinued his chase and shortly thereafter, Costa Mesa Police Officer, Sgt. Santee arrived at the scene with additional Costa Mesa Police officers and established a perimeter (AER 167). The passenger in Petitioner's car told the officers that Petitioner ran because there was a warrant for his arrest and that he had been drinking (AER 167). She also provided the officers with Petitioner's name and date of birth (AER 167). Sergeant Durham at the Costa Mesa Police station heard this

information, ran an in-house records check, and found that Petitioner had two prior arrests for armed robbery and one for burglary (AER 167). Sgt. Durham broadcasted Petitioner's prior criminal history to the officers at the scene (AER 167).

Based upon the foregoing information, the fact that Petitioner had gone to great lengths to evade and resist Officer McCarthy, and the fact that Petitioner may have been hiding with a weapon among the dense foliage in a large, unlit residential backyard at night, Sgt. Santee, for the safety of his officers and residents of nearby homes, requested that a Canine Officer be located to aid in the search for Petitioner (AER 156, 167). City of Santa Ana Police Officer Letizio and his dog, Rex, responded to the request (AER 156). After his arrival and discussion with Sgt. Santee, Santa Ana Police Officer Letizio decided to use the dog to search for Petitioner (AER 156).

Officer McCarthy spoke with the resident of 2820 Drake who indicated no one had permission to be in his backyard (AER 168). The resident then gave the officers permission to search his backyard for Petitioner (AER 168). Officers Letizio and McCarthy entered the backyard through the gate, stopping inside the gate in a position of cover (AER 168). Canine announcements were made by Santa Ana Police Officer Letizio for Petitioner to surrender and the dog would not be released (AER 168). When no response was heard after thirty seconds, Santa Ana Police Officer Letizio released the dog (AER 168). The canine located Petitioner hiding against a block wall in an area covered by Oleander bushes (AER 168, 172). Petitioner and the dog exited the bushes and rolled on the ground (AER 173). Petitioner was fighting and punching

the dog, who had a bite hold on his right elbow (AER 173). Officer Letizio ordered Petitioner to stop fighting the dog, however, Petitioner continuously ignored Officer Letizio's repeated orders (AER 173). Both officers kept their distance until Petitioner complied with Officer Letizio's request and showed his hands (AER 174). At that time, the dog was taken off the bite (AER 174). Petitioner was arrested for driving under the influence, evading a police officer and resisting arrest (AER 165). He was treated at the scene by Costa Mesa Fire Paramedics and subsequently transported to Western Medical Center for further treatment (AER 174).

2. Procedural History

On June 24, 1992, Petitioners Thomas Shannon and Craig Brooks filed and served their First Amended Complaint alleging a violation of their civil rights pursuant to 42 U.S.C. § 1983. (AER 7) In addition to their federal civil rights claims, Petitioners also alleged pendent state claims which were dismissed by the District Court on December 23, 1992 (AER 27).

Among the Defendants named in the Complaint were the City of Costa Mesa, Costa Mesa Chief of Police, David Snowden, and Costa Mesa Police Officers Sgt. Durham, Sgt. Santee and Officer McCarthy (AER 7). Also named as Defendants were the City of Santa Ana, its Chief of Police, Dave Walters, and Officer Letizio (AER 7). The First Amended Complaint was amended a second time to add additional Santa Ana Police Officers as defendants (AER 741).

The alleged civil rights violations of the two Petitioners, Shannon and Brooks, involved different facts, circumstances, and incidents which occurred on two different days (AER 165, 289). Furthermore, no City of Costa Mesa Police Officers were present at, or participated in, the arrest of Petitioner Brooks (AER 289). On or about November 16, 1992, the District Court determined that Petitioners Shannon and Brooks were misjoined and ordered the matters severed pursuant to FRCP 20 and 21 (Appellees' supplemental excerpt of record 4 hereinafter "ASER".) Thereafter, Petitioner Shannon filed his Third Amended Complaint. (ASER 19)

On or about May 3, 1993, Respondents City of Costa Mesa, Chief David Snowden, Sgt. Durham, Sgt. Santee and Officer McCarthy (hereinafter "Respondents") filed and served upon Petitioner Shannon (hereinafter "Petitioner") a Motion for Summary Judgment which was scheduled to be heard on May 24, 1993 (AER 152). According to Local Rule 76, Petitioner had until May 10, 1993 to file and serve an Opposition to said motion. No Opposition was filed by Petitioner on May 10, 1993, and on May 12, 1993, the Court vacated the May 24, 1993 hearing date and granted Respondents' Motion for Summary Judgment in its entirety. (AER 201) On May 13, 1993, Petitioner brought an Ex Parte Application for Leave to File Late Opposition to Respondents' Motion for Summary Judgment. (AER 212) The Court denied the Ex Parte Application and rejected Petitioner's Opposition to Respondents' Motion for Summary Judgment and Separate Statement of Genuine Issues of Fact. (AER 239)

Previously, on or about April 14, 1993, the City of Santa Ana, its Chief of Police, Dave Walters, and Officers

Letizio, Fleet, Luna and Bretagna filed and served upon Petitioner their Motion for Summary Judgment (AER 37). The attorneys for the City of Santa Ana and its Officers neglected to include Santa Ana's Chief of Police and the Respondent officers in the Notice of Motion. Thereafter, on May 5, 1993, the City of Santa Ana and its Respondent officers filed an Amended Notice of Motion for Summary Judgment (AER 144 & 148). The only change was the addition of Officers Letizio, Fleet, Luna and Chief Walters in the Notice of the Motion (AER 146). On May 12, 1993, the Court granted the Motion for Summary Judgment brought on behalf of the Santa Ana Police Officers on the grounds of qualified immunity, and continued the Motion for Summary Judgment as to the City of Santa Ana and Chief Walters. (AER 202) The City of Santa Ana and Chief Walters brought a Second Motion for Summary Judgment addressing all causes of action against them. This second Motion for Summary Judgment was granted. (AER 324)

On or about June 4, 1993, Petitioner filed a Motion for Reconsideration of Judge McLaughlin's May 12, 1993 Orders granting Respondents' Motion for Summary Judgment and the Motion for Summary Judgment filed by the Santa Ana Police officers (AER 240). This Order was affirmed. (AER 323)

Judgment in the Motion for Summary Judgment filed by the Respondents was entered on July 1, 1993 (ASER 28). Thereafter, Petitioner filed a Motion for Relief, pursuant to Federal Rules 59 and 60, to set aside these judgments. (AER 655) This motion was denied (AER 736).

Petitioners appealed the District Court's Order of July 1, 1993, granting the Motion for Summary Judgment

filed by Respondents as to Petitioner Shannon's federal civil rights causes of action. The Ninth Circuit Court of Appeals reviewed the District Court's granting of the Motion for Summary Judgment *de novo*, and on February 3, 1995 the Court affirmed the Order of the District Court. On March 22, 1995, the Ninth Circuit Court of Appeals denied Petitioners' Petition for Rehearing and rejected Petitioners' suggestion for hearing en banc. Petitioners are now appealing the order of the Ninth Circuit Court of Appeals.

REASONS THE WRIT SHOULD BE DENIED

I. THE COURT SHOULD CONSIDER THE QUESTIONS PRESENTED WITH RESPECT TO APPELLANT SHANNON ONLY AND SHOULD DISREGARD THE SECOND QUESTION PRESENTED

As previously indicated in the Statement of Facts herein, on November 16, 1992 the District Court ordered that the complaints of Petitioners Shannon and Brooks be severed. However, Petitioners Shannon and Brooks have repeatedly ignored this court order, and have filed the instant Petition for Writ of Certiorari ("Petition") as if they were still joined. Respondents respectfully request that Court consider the Questions Presented with respect to Petitioner Shannon only, pursuant to the order of severance issued by the District Court.

The second Question Presented in the Petition relates to the appeal of Petitioner Brooks only, who had already been placed under arrest at the time of the canine search,

and is therefore inapplicable to the Petition against Respondents herein. Therefore, Respondents request that the court decline to consider the second Question Presented with respect to these Respondents.

II. THE COURT FULLY CONSIDERED AND CORRECTLY DECIDED WHETHER RESPONDENTS WERE ENTITLED TO QUALIFIED IMMUNITY

As the Appellate Record reflects, the District Court granted Respondents' Motion for Summary Judgment. Petitioner appealed the District Court's Order granting Summary Judgment, and said appeal was heard in the Ninth Circuit Court of Appeals. A grant of summary judgment is reviewed *de novo. Kruso v. International Telephone & Telegraph Corp.*, 872 F.2d 1416, 1421 (9th Cir. 1989); *State Farm Fire & Casualty Co. v. Martin*, 872 F.2d 319, 320 (9th Cir. 1989). The appellate court must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Tzung v. State Farm Fire & Casualty Co.*, 873 F.2d 1338, 1339-90 (9th Cir. 1989); *Judie v. Hamilton*, 872 F.2d 919, 920 (9th Cir. 1989).

Entry of summary judgment is proper against a party who, "after adequate time for discovery," fails to make a showing sufficient to establish the existence of an element essential to that party's case, and upon which that party will bear the burden of proof at trial." *Celotex Corp. v. Cattrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

Subsequent to its *de novo* review, the Ninth Circuit upheld the District Court's order granting Respondents' Motion for Summary Judgment. The Ninth Circuit reviewed the factors set forth in *Graham v. Conner*, 490 U.S. 386 (1989) and held that "[r]eview of the *Graham* factors leads to the same conclusion. The most important element, 'whether the suspect poses an immediate threat to the safety of the officers or others,' *Chew [vs. Gates*, 27 F.3d 1432 (9th Cir. 1994)], 27 F.3d at 1441, weighs against Shannon." Petitioner's Appendix Page A-7.

The Ninth Circuit in its *de novo* review considered the appellate record, the briefs submitted by Petitioners and Respondents, and oral argument from all parties. Subsequent to this review, the Ninth Circuit upheld the granting of the Motions for Summary Judgment brought by Respondents herein and by the City of Santa Ana and its employees. The Ninth Circuit was not obligated to expound upon each and every document or declaration it considered, and committed no error when it scrupulously reviewed Petitioner's evidence and upheld the Order of the District Court granting Summary Judgment in favor of respondents herein. Respondents therefore respectfully urge the Court to deny Petitioner's Petition for Writ of Certiorari.

III. SHANNON'S ARGUMENT POSITED IN HIS FIRST QUESTION PRESENTED IS WITHOUT MERIT AND IS POSED FOR THE FIRST TIME HERE ON APPEAL

Petitioner Shannon's first Question Presented presupposes that the court below determined that the use of

a police canine under the circumstances presented to respondents constituted a "novel use of a weapon" which violated "the lethal force rule of *Tennessee v. Gardner*, 471 U.S. 1 (1985)" and subsequently ruled that respondents were entitled to qualified immunity. Petitioner Shannon also presupposes that the use of a trained police canine to search for hidden subjects constitutes a "novel use of a weapon," or is even considered a "use of force" subject to *Gardner*.

Indeed, one of Shannon's "questions presented" to the Ninth Circuit was whether *Tennessee v. Gardner* applied to the use of a canine. Thus, on appeal Shannon argued that the use of trained police canines to search for concealed subjects **should** be subject to *Gardner;* here on appeal he leaps forward a step and states for the first time that such use **is** subject to *Gardner*. Shannon has crafted a new question comprised of selected portions of his appellate record. However, this question was not raised on appeal and is without merit.

The court never ruled that the use of a trained police canine to search for hidden suspects constitutes deadly force. Petitioner has made yet another leap – that such use of a canine constitutes excessive force.

IV. THE THIRD QUESTION PRESENTED, OF WHETHER A CONSTITUTIONAL RIGHT OF SELF DEFENSE EXISTS, WAS NOT RAISED OR PRESERVED BELOW

Petitioner Shannon did not raise any arguments pertaining to the existence of a "constitutional right of self-defense" on appeal. Because Petitioner did not raise this

argument below, he has waived his right to raise it now for the first time. Respondents request that the Court deny certiorari to the issue raised in the third Question Presented.

V. THE COURT SHOULD DENY CERTIORARI TO REVIEW THE FOURTH QUESTION PRESENTED IN PETITIONER SHANNON'S PETITION BECAUSE THE NINTH CIRCUIT COURT OF APPEALS FULLY CONSIDERED AND CORRECTLY DECIDED THE ISSUE PERTAINING TO THE EVIDENCE PRESENTED BY PETITIONER IN OPPOSITION TO RESPONDENTS' MOTION FOR SUMMARY JUDGMENT

Petitioner argues that the Ninth Circuit "blithely disregarded" (Petition p. 25) the expert declarations and suggests that they are "ignorant of reality and apparently relying on "Lassie" reruns and wishful thinking" (Petition p. 28) when the court held that Petitioner's expert declarations were insufficient to defeat respondents' Motion for Summary Judgment. However, contrary to Petitioner's allegations, the Ninth Circuit carefully considered the expert declarations.

Indeed, the Ninth Circuit specifically noted the declarations were *inadmissible*, but that "[e]ven if the district court erred in concluding that the declarations of Peter Meade, M.D., and Van Ness Bogardus, II, were inadmissible, **they are insufficient to withstand the summary judgment motions in these cases.**" (Emphasis added; Petitioner's Appendix to Petition p. A-9.)

The Ninth Circuit upheld the District Court's determination that the declarations were inadmissible. Indeed,

the Declarations of Dr. Meade and Mr. Bogardus were not part of Petitioner's Opposition to Respondents' Motion for Summary Judgment. Respondents urged the Ninth Circuit Court of Appeal to decline to consider these declarations, as a Court of Appeals inquiry is limited to the summary judgment record before the trial court, and parties cannot add exhibits, depositions, or affidavits to support their positions on appeal. *Topalian v. Ehrman* (5th Cir. 1992) 954 F.2d 1125, 1131.

In their *de novo* review of the District Court's Order granting Summary Judgment, the Ninth Circuit reviewed arguments by both Petitioner and respondents pertaining to the admissibility and weight of the declarations. In his Petition for Writ of Certiorari, Petitioner improperly attempts to obfuscate the Court from the question of *why* the court should review this matter with emotional appeals concerning nightmares suffered by concentration camp survivors and references to television shows.

Petitioner offers no evidence to support his contention, that the court improperly failed to consider the inadmissible declarations of Dr. Meade and Mr. Bogardus, even though their declarations contained no evidence of whether the use of the canine in the case at bar was reasonable according to the courts' decisions in *Robinette v. Barnes*, 854 F.2d 909 (6th Cir. 1988) and *Chew v. Gates*, 27 F.3d 1432, 1447-1449 (9th Cir. 1994). Rather, Petitioner offers only conclusory statements pertaining to dog bite injuries in general and use of force policies at other police departments. For example, the Declaration of Mr. Bogardus failed to set forth any specific facts alleging that any of the officers' actions were "objectively unreasonable" or otherwise were in violation of the Costa Mesa

or Santa Ana Police Department policies, which is required in an analysis of reasonable behavior pursuant to *Graham*.

Petitioner has set forth no law which would require the Ninth Circuit to draft a lengthy dissertation of its decision to uphold the District Court's determination that the declarations proffered by Petitioner were insufficient to defeat respondents' Motion for Summary Judgment. The Ninth Circuit's decision, issued subsequent to its *de novo* review of the District Court's Order, should not be disturbed.

CONCLUSION

For the foregoing reasons, Respondents City of Costa Mesa, Chief David Snowden, Sgt. Durham, Sgt. Santee and Officer McCarthy respectfully request that the Court deny Petitioner Shannon's Petition for Writ of Certiorari.

Respectfully submitted,

BURKE, WILLIAMS
& SORENSEN
J. ROBERT FLANDRICK

Counsel of Record for Respondents City of Costa Mesa, Chief David Snowden, Sgt. Durham, Sgt. Santee and Officer McCarthy

Supreme Court, U.S.
FILED
AUG 15 1995
CLERK

(3)

No. 94-2097

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1995

THOMAS SHANNON and CRAIG BROOKS,
Petitioners,

V.

CITY OF COSTA MESA, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the district court abused its discretion in granting respondents' motions for summary judgment.

2. Whether the district court abused its discretion in denying petitioners' motion for relief pursuant to F.R.C.P. 59 and 60.

3. Whether respondents' motions for summary judgment should be affirmed as no genuine issues of material fact exist.

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STATEMENT OF THE CASE

1. Statement of Facts

A. Thomas Shannon

Petitioner/plaintiff Shannon's complaint arises out of events surrounding his arrest on June 29, 1991. On that date, in the early morning at approximately 4:26 a.m., Officer McCarthy of the Costa Mesa Police Department saw Shannon driving 60 miles per hour on Baker Street in the City of Costa Mesa (AER 159). The officer attempted to catch up with the plaintiff (AER 159). The officer had difficulty pursuing the plaintiff because he made several sudden turns onto other surface streets (AER 159). Eventually, the plaintiff ran a red light and drove up onto the grass of a business called Arnies Manhattan Deli (AER 160). The officer pulled up directly behind the plaintiff's vehicle (AER 160). Shannon got out of his car and began to walk down the sidewalk (AER 160). Officer McCarthy told Shannon to stop, but he kept walking (AER 160). Officer McCarthy then immediately yelled "Stop, police!" (AER 160). Shannon turned to look at Officer McCarthy, shrugged his shoulders, and then ran (AER 160).

The plaintiff climbed over a 6-foot wood fence and into a drainage ditch (AER 160). He then ran down the drainage ditch and eventually climbed over a 6-foot chain link fence which was barbed on the top (AER 160). He continued to run behind an apartment complex jumping over two 7 to 8-

foot spiked wrought iron gates (AER 160). The officer last saw the plaintiff lying on his stomach on top of a wall adjacent to the backyard of a residence (AER 160).

Sergeant Durham of the Costa Mesa Police Department ran a records check on Mr. Shannon. It revealed two prior arrests for armed robbery and one arrest for burglary (AER 157). Based on Shannon's prior arrests for crimes involving the use of weapons, his evasion of Officer McCarthy, the uncertainty of Shannon's location and possibility he may be hiding among the dense foliage in the unlit back yard of a residence, Sergeant Santee requested a canine unit to assist in order to further officer safety (AER 156).

Officer Letizio of the Santa Ana Police Department thereafter arrived with his canine, Rex (RER 50). He was briefed by Officer McCarthy who told him that Shannon had last been seen going over the backyard wall of a residence (AER 161). Officer Letizio was also briefed regarding the foot pursuit and the information obtained from Sergeant Durham regarding Shannon's previous felony arrests including armed robbery. (AER 161-162, RER 164). Sergeant Santee of the Costa Mesa Police Department also told Officer Letizio of Shannon's outstanding warrants and that he requested a canine to do the search as he did not want to send officers in alone. (AER 283, RER 164).

The officers went to the residence of Ben Mobley where the suspect had last been

seen (RER 50). The officers asked for and were given permission to search Mr. Mobley's back yard (RER 54).

Officer Letizio took canine, Rex, to the back yard (RER 51). Canine announcements were made by Officer Letizio (RER 51). He yelled for the suspect to come out or else a dog would be released (RER 51). After thirty seconds, when there was no response, the canine was released to search for the suspect (RER 51). The canine eventually located the plaintiff who was hiding in dense foliage against a block wall in an area covered with oleander bushes (RER 51). The plaintiff and canine exited the oleanders. The plaintiff was hitting the canine about his head and body (RER 51). Officer Letizio ordered the plaintiff to stop fighting with the dog and put his hands in plain view (RER 51). Officers Letizio and McCarthy kept their distance due to the fact that they were still unable to determine if Shannon was armed because they were unable to instigate any type of search due to Shannon's failure to comply with orders (AER 173). When Shannon complied with the officer's instructions, the dog was taken off the bite hold and the plaintiff was arrested and transported to Western Medical Center (RER 51).

Shannon testified in his deposition he had no memory of what happened in the back yard, as he apparently was unconscious.

B. Craig Brooks

On June 25, 1991, at approximately 4:30 p.m., Officer Bertagna of the Santa Ana Police Department was sent to the area of the Fourth Street exit of the 55 Freeway in order to assist Irvine police officers in the search for an escaped prisoner who had been in custody for grand theft auto and felony hit and run (RER 114). Mr. Brooks had been taken to a hospital where he was put on an x-ray table in order to have x-rays taken (RER 108). When a police officer at the hospital was not looking, the plaintiff removed his I.V.'s and neck brace and left the hospital on foot (RER 108).

When Officer Bertagna of the Santa Ana Police Department arrived, he was advised that the suspect was last seen running through a construction area where there were many tools and objects which could have been used as weapons (RER 114).

Officer Bertagna proceeded to the area where the suspect was last seen (RER 115). Before beginning a search with the canines, Corporal Fleet and Sergeant Luna gave several canine announcements over a megaphone (RER 115). Sergeant Luna himself used a megaphone to give two canine announcements (RER 116). After two minutes, when there was no response from the suspect, police canine, Arco, was used on the leash to search for suspect, Brooks (RER 115). The police canine eventually found Brooks hiding in some thick foliage just outside the construction area (RER 115). Immediately thereafter, yelling was

heard (RER 115). The suspect came out of the bushes hitting and fighting with the dog (RER 115). Officer Bertagna instructed the suspect to stop fighting with the dog and to put his hands out in plain view (RER 115). Brooks complied and Officer Bertagna grabbed Arco by his collar and called him off the bite hold (RER 115). The suspect was immediately taken under arrest again and released in the custody of the Irvine Police Department.

2. Procedural History

On June 24, 1992 petitioners Thomas Shannon and Craig Brooks filed and served the First Amended Complaint alleging a violation of their civil rights pursuant to 42 U.S.C. Section 1983 (AER 7). In addition to their Federal civil rights claims, petitioners also alleged pendent state claims which were dismissed by the District Court on December 23, 1992 (AER 27).

Among the defendants named in the complaint were the City of Santa Ana, its Chief of Police, Paul Walters, and Officer Letizio (AER 7). Also named as defendants were City of Costa Mesa, Costa Mesa's Chief of Police, David Snowden, and Costa Mesa Police Officers Sergeant Durham, Sergeant Santee, and Officer McCarthy (AER 7). The First Amended Complaint was amended a second time to add additional Santa Ana Police Officers as defendants (AER 741).

The alleged civil rights violations of the two petitioners, Shannon and Brooks, involved different facts, circumstances, and incidents which occurred on two different days (AER 165, 289). Furthermore, no City of Costa Mesa police officers were present at, or participated in, the arrest of petitioner Brooks (AER 289). On or about November 16, 1992, the District Court determined that petitioners Shannon and Brooks were misjoined and ordered the matters severed pursuant to FRCP 20 and 21 (Appellee's Supplemental Excerpt of Record for hereinafter "ASER"). Thereafter, petitioner Shannon filed his Third Amended Complaint (ASER 19).

On or about April 14, 1993, the City of Santa Ana, its Chief Paul Walters, and Officers Letizio, Fleet, Luna and Bertagna, filed and served upon petitioner their Motion for Summary Judgment (AER 37). Thereafter, on May 5, 1993, the City of Santa Ana and its officers filed an Amended Notice of Motion for Summary Judgment (AER 144 and 148). On May 12, 1993, the Court granted the Motion for Summary Judgment brought on behalf of the Officers Letizio, Fleet, Luna and Bertagna on the grounds of qualified immunity, and continued the Motion for Summary Judgment as to the City of Santa Ana and Chief Walters (AER 202). The City of Santa Ana and Chief Walters brought a second Motion for Summary Judgment addressing all causes of action against them. This second motion for summary judgment was granted (AER 324).

On or about May 3, 1993, the City of Costa Mesa, Chief David Snowden, Sergeant Durham, Sergeant Santee, and Officer McCarthy, filed and served upon petitioner Shannon hereinafter ("Petitioner"), a Motion for Summary Judgment which was scheduled to be heard on May 24, 1993 (AER 152). According to Local Rule 76, petitioner had until May 10, 1993 to file and serve an opposition to said motion. No opposition was filed by petitioner on May 10, 1993, and on May 12, 1993, the Court vacated the May 24, 1993 hearing date, and granted the Motion for Summary Judgment in its entirety (AER 201). On May 13, 1993, petitioner brought an Ex Parte Application for leave to file late opposition to the Motion for Summary Judgment (AER 212). The Court denied the Ex Parte Application and rejected petitioner's Opposition to the Motion for Summary Judgment and Separate Statement of Genuine Issues of Fact (AER 239).

On or about June 4, 1993, petitioner filed a Motion for Reconsideration of Judge McLaughlin's May 12, 1993 orders granting the City of Costa Mesa and its officers' motion for summary judgment and the motion for summary judgment filed by the Santa Ana Police Officers (AER 240). The order was affirmed (AER 323). Thereafter, petitioner filed a Motion for Relief, pursuant to Federal Rules 59 and 60, to set aside these judgments (AER 655). This motion was denied (AER 736).

Petitioners appealed the District Court's order of July 1, 1993 granting the motion for summary judgment. The Ninth

Circuit Court of Appeals reviewed the District Court's granting of the motion for summary judgment de novo, and on February 3, 1995 the court affirmed the order of the District Court. On March 22, 1995, the Ninth Circuit Court of Appeals denied petitioner's petition for rehearing and rejected petitioner's suggestion for hearing En Banc. Petitioners are now appealing the order of the Ninth Circuit Court of Appeals.

REASONS THE WRIT SHOULD BE DENIED

I. THE OFFICERS IN THIS CASE SHOULD BE GRANTED QUALIFIED IMMUNITY DUE TO THE FACT THAT THE LAW GOVERNING THE USE OF CANINES WAS NOT SUFFICIENTLY CLEAR AND THE ACTIONS OF THE OFFICERS WERE OBJECTIVELY REASONABLE.

Initially, the petitioners' argument regarding qualified immunity focuses on whether in fact qualified immunity is available in 4th Amendment excessive force cases. They seem to attempt to draw a distinction between the decision in Chew v. Gates, 27 F.3d 1432 (9th Cir. 1994) and the decision in Hopkins v. Andaya, 958 F.2d 881, 885, footnote 3 (9th Cir. 1992). However, both courts in Chew and Hopkins recognize that officers are entitled to assert the defense of qualified immunity in Section 1983 liability claims if they reasonably believed in good faith that their actions were constitutional. Chew 27 F.3d 1432, 1444 (9th Cir. 1994); Hopkins 958 F.2d 881 (9th Cir. 1992). Whether the elements of the defense are analyzed separately or decided on the merits would

have no affect on this case since the lower court found the actions of the officers to be objectively reasonable.

Petitioners have attempted to assert that the defense of qualified immunity hinges merely on the court's previously ruling in the area of the constitutional violation alleged. However, as stated specifically in Chew v. Gates, 27 F.3d 1432, 1447 (9th Cir. 1994):

> A specific precedent is not required in order to overcome a qualified immunity defense, but the law in question must be sufficiently clear that the unlawfulness of the action would have been apparent to a reasonable official.
>
> Citing Anderson v. Creighton, 483 U.S. 635, 640.

The lower court properly found that the law governing use of canines was not sufficiently clear and any unlawfulness of the actions would not be apparent to a reasonable official with regard to these specific facts. Furthermore, the facts here did not present a situation in which a person is lying prone and handcuffed on the ground when a police canine is released. A situation in which a chase had ensued followed both Shannon and Brook's elaborate flights. Shannon had an armed felony background, hid in dense foliage, late at night in a residential back yard. Brooks escaped from police custody after being arrested for felony

drunk driving with injuries, hit and run, and hid in dense foliage after last seen running through a construction site where weapons were readily available. The officers had no opportunity to speak with plaintiffs, search them, and could only see their flight as giving rise to a concern for their own safety and the safety of others. Only after proper and unheeded warnings was a police canine released to find the subjects. Clearly, these cases pass the objective reasonableness test of Graham. These facts clearly do not give rise to any constitutional violation and as the 9th Circuit found in Chew v. Gates, any law regarding canine use in these specific types of situations, was not clearly established. Therefore, it was proper to grant qualified immunity to the individual officers in both the Shannon case and the Brooks case.

II. PETITIONER, BROOKS, HAS FAILED TO PROVE OR ESTABLISH THAT THE USE OF EXCESSIVE FORCE AMOUNTS TO PUNISHMENT.

As the Court noted in Graham v. Connor, 490 U.S. 386 (1989) page 395, footnote 10, it may be unclear whether the 4th Amendment continues to provide individuals with protection beyond the point of arrest, but it is clear "that the due process clause protects a pre-trial detainee from the use of excessive force that amounts to punishment." See Bell v. Wolfish, 441 U.S. 520, 535-539 (1979). Additionally, the Court goes on to state that after a conviction the 8th Amendment

serves as a source of protection with regards to excessive force. Id.

In the present matter, Brooks is the only petitioner who had earlier that same day been placed under arrest and then escaped. He was sought by Santa Ana officers after his escape from the custody of Irvine officers to be placed under arrest again when the alleged excessive force occurred. Therefore, Brooks is not truly a pre-trial arrestee because he has escaped custody when Santa Ana canines are called on to find him. Nevertheless, if the Court considers petitioners' second point, it is important to only look at Brooks and the facts relating to his case in this regard. It is important to note, that Brooks in his Third Amended Complaint only pleads a cause of action for violation of his 4th Amendment rights. A-9, A-10. Therefore, Brooks has only alleged a violation based on objective reasonableness whereas, the case law cited above states that a violation with regards to excessive force must prove force that amounts to punishment. This of course would be guided by the 14th Amendment substantive due process claim with regard to a pre-trial detainee and the 8th Amendment with regard to a post-trial convict. See Bell v. Wolfish, 441 U.S. 520 (1979); see Whitley v. Albers, 475 U.S. 312 (1986). As stated in Graham, the 4th Amendment only applies to claims that law enforcement officers have used excessive force in the course and arrest, investigatory stop, or the "seizure" of a free citizen. Graham v. Connor, 490 U.S. 386, 395 (1989), emphasis added.

Brooks has not pleaded any allegations of the 14th Amendment violation in his operative pleadings. Additionally, he has presented no evidence whatsoever regarding the excessive force surmounting to punishment in this case. Brooks' failure to allege any 14th Amendment violation is fatal and any other allegations on his part should not be considered.

Even if Brooks were properly able to plead a 4th Amendment violation, which the respondents deny, the actions of the officers were objectively reasonable as a matter of law which the District Court properly decided. Petitioner, Brooks, had escaped from a local hospital where he was being held on felony charges. After his escape, he had travelled through an area where construction was being done where several types of possible weapons could be gathered. The officers gave several canine warnings over a bullhorn with no response. Thereafter, the respondent officers initiated a canine search in an area where petitioner eventually was found in foliage. The petitioner exited from the foliage after a bite hold was achieved and the canine was released immediately after petitioner complied with the officers' requests. The officers' concerns for safety and the pursuit of a fleeing felon justified their actions which were objectively reasonable under the Graham v. Connor analysis. Therefore, even if the 4th Amendment was applied in this case the District Court properly evaluated such claims and granted

respondents' previous motions for summary judgment.

III. PERSONS LAWFULLY ARRESTED ONLY RETAIN THEIR RIGHT TO USE SELF-DEFENSE WHEN EXCESSIVE FORCE IS BEING APPLIED.

Initially, petitioners third question presented regarding whether a constitutional right of self-defense exists was not raised below. Petitioners did not raise any arguments regarding this issue on appeal. Because petitioners did not raise this argument below, they have waived their right to raise it now for the first time. Therefore, respondents request the Court to deny certiorari in the third question presented.

If in fact the Court reviews this issue, even though it was not raised below, it is true that both Shannon and Brooks resisted their lawful arrests by fighting and striking the canines. Both petitioners' injuries were aggravated by their own act in not complying with the officers' requests. Instead of complying, the petitioners fought against the dogs and inflicted injury upon themselves.

Petitioners' third argument in their Petition for Writ of Certiorari is that the petitioners had a right of self-defense against the canines in this instance. The premise is that a person lawfully arrested retains his or her right of self-defense against excessive force. Petitioners cite People v. Curtis, 70 Cal.2d 347, 357, 74 Cal.Rptr. 713, 719, 450 P.2d 33 (1969) for the proposition

that a person lawfully arrested still retains his or her right to self-defense against **excessive force**. Of course, each petitioner here is actively fleeing, hiding and thus resisting his apprehension by the police, as opposed to already being in custody. Regardless, respondents in this matter do not refute such a proposition that indeed a post-arrestee does retain his or her right to self-defense when in fact **excessive force** is used. Petitioners' basic untenable premise is that the use of a police canine at any time is per se excessive force. However, petitioners' argument is somewhat circular in that the District Court and the 9th Circuit Court of Appeals have both decided that there was no use of **excessive force** in this instance. Therefore, petitioners' argument in this regard is irrelevant and should not be considered.

IV. THE DECLARATION SUBMITTED BY PLAINTIFFS' SUPPOSED EXPERTS SHOULD NOT BE CONSIDERED FOR PURPOSES OF SUMMARY JUDGMENT AND EVEN IF CONSIDERED ARE INSUFFICIENT TO WITHSTAND SUMMARY JUDGMENT.

All evidence including affidavits submitted in opposition to a motion for summary judgment must be admissible under rules governing admission of evidence. Hal Roach Studios, Inc. v. Feiner Co., Inc., 883 F.2d 1429 (9th Cir. 1989). Whether summary judgment is appropriate in any case needs to be decided upon the particular facts of the case. Sobus v. Lumbermens Mutual Casualty Co., 393 F.Supp. 661 (D. Md. 1975).

Affidavits by experts who have not familiarized themselves with the record are insufficient to withstand a summary judgment motion. Monks v. General Electric Co., 919 F.2d 1189 (6th Cir. 1990); see also Federal Rules of Evidence, Rule 703, 28 U.S.C.A.

Federal Rules of Evidence, Rule 801(c) defines hearsay as any statement, other than one made by the declarant while testifying at a trial or hearing, offered into evidence to prove the truth of the matter asserted. Pursuant to Federal Rules of Evidence, Rule 802, hearsay is not admissible unless if falls within the hearsay exception.

The District Court has wide discretion in determining whether or not to admit and exclude evidence, particularly in the case of expert testimony. Hamling v. U.S., 94 S.Ct. 2887, 418 U.S. 87 (1974). On appeal from summary judgment, the reviewing court will neither approve nor consider inadmissible hearsay contained in an affidavit opposing a motion for summary judgment. Arney v. U.S., 479 F.2d 653 (9th Cir. 1973).

In order to successfully oppose a motion for summary judgment, a party must not rely on conclusory allegations in the pleadings, but must offer some evidence at least outlining a factual dispute. U.S. v. Allen, 578 F.2d 236 (9th Cir. 1978). Conclusory and general allegations in an affidavit are insufficient to support a motion for summary judgment. Goldberg v. U.S. Department of State, (D.C. Cir.

1987). Affidavits must be specific and detailed. Id. Inquiry focuses on whether the non-moving party has come forward with sufficiently specific facts from which to draw reasonable inferences about other material facts that are the necessary elements of a non-moving party's claim. T.W. Electrical Service, Inc. v. Pacific Electrical Contractors Association, 809 F.2d 626, 630 (9th Cir. 1987).

Both Dr. Meade and Van Ness Bogardus whose declarations the plaintiff relied upon, had no personal knowledge of the facts of either the Shannon or the Brooks cases. The declarations were xeroxed copies of standard declarations used in many of the plaintiffs' attorney's dog bite cases. As such, it is evident that Dr. Meade and Van Ness Bogardus have not familiarized themselves with either the Shannon or Brooks cases. Affidavits by experts who have not familiarized themselves with the record and documents available are insufficient to withstand a motion for summary judgment. Monks v. General Electric Co., 919 F.2d 1189 (6th Cir. 1990). Dr. Meade is not an expert in police canine cases and has not even personally examined any persons bitten by a police dog. The only information he puts forth, which is not specifically related to the Shannon or Brooks cases, is information which he has gathered by reviewing records made by other persons.

Van Ness Bogardus also does not have personal knowledge of either the Shannon or Brooks cases. As stated in his declaration he only relies upon four

reports one of which was made out by a canine handler who was not even involved in the incidents (AER 124). He also refers to the Santa Ana Police Department's policy of "bite and hold" when in fact the Santa Ana Police Department's policy is to "search and bark." (AER 125) He bases any and all conclusions on the comparisons to other police departments which have different policies. His opinions and conclusions are based on erroneous information. Mr. Van Ness Bogardus readily admits that he was not present and did not even bother to obtain further information from either of the plaintiffs themselves. Mr. Bogardus also does not address how any of the Santa Ana Police Department policies pertaining to police dogs' use in apprehending suspects caused the violation of Mr. Shannon's or Mr. Brooks' civil rights. Affidavits of experts submitted in a motion for summary judgment should show knowledge of opposing contentions of fact that develop during discovery and deal with those contentions. Granoff v. Merrill Lynch & Co., 775 F.Supp. 621 (S.D.N.Y. 1991).

Additionally, the declarations of Van Ness Bogardus and Dr. Meade rely extensively on hearsay. Specifically, both experts rely on information obtained from other police departments, other trainers and other third party sources not related to the case. Both Van Ness Bogardus and Dr. Meade rely on outside sources without attaching those sources to their declarations otherwise providing foundation for admissibility. Pursuant to

Federal Rules of Evidence, Rules 801 to 802, the District Court properly excluded the declaration of Van Ness Bogardus and Dr. Meade because the opinions and conclusions stated therein are based on hearsay.

Even if the declarations were admitted, they are still insufficient to withstand a motion for summary judgment in this matter. Petitioners argue in their Petition for Writ of Certiorari that the 9th Circuit panel "should not have blithely disregarded the expert declarations" (see Petition for Writ of Certiorari at Page 25) and that the "panel's refusal in this case to even acknowledge plaintiffs' evidence is inexcusable" (see Petition for Writ of Certiorari at Page 26). What petitioners have failed to recognize is that in fact the 9th Circuit Court of Appeals did review the declarations in making their decision in this case. The Court concluded that "even if the District Court erred in concluding that the declarations of Peter Meade, M.D. and Van Ness Bogardus, II were inadmissible, they were insufficient to withstand the summary judgment motions in these cases." B-12. As seen above, even if the declarations were admissible for motion for summary judgment purposes, which the defendants in this matter vehemently deny, the 9th Circuit panel has reviewed those declarations and has stated they are insufficient in this case to withstand defendants' motion for summary judgment.

Based on the foregoing, the declarations of petitioners' supposed experts in this matter are inadmissible and insufficient to withstand a motion for summary judgment. Therefore, the 9th Circuit's affirmance of the District Court's decision should be upheld.

---------- * ----------

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

KINKLE, RODIGER & SPRIGGS
David P. Lenhardt

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 92 3397 LHM (CTx)
THIRD AMENDED COMPLAINT BY PLAINTIFF CRAIG BROOKS
DEMAND FOR JURY TRIAL

CRAIG BROOKS,

Plaintiff,

vs.

CITY OF SANTA ANA; CITY OF IRVINE; PAUL WALTERS, Chief of Police of the Santa Ana Police Department; LEO PEART, former Chief of Police of the Irvine Police Department; Santa Ana Police Officer ANTHONY BERTANA (#1615); Santa Ana Police Officer RAUL LUNA (#734); MICHAEL FLEET (#188); in both their personal and official capacities, and DOES 1 through 200, inclusive,

Defendants.

JURISDICTION AND VENUE

1. The claims herein are asserted pursuant to the United States Constitution and 42 U.S.C. Section 1983, et seq., and the jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sections 1331 and 1343.

2. The acts complained of arose in this District, and therefore venue lies in this District pursuant to 28 U.S.C. Section 1391.

PARTIES

3. The party or parties who make this Complaint were within the jurisdiction of the United States of America at all times alleged herein.

4. All defendants are either California peace officers or California governmental entities or others whose identities are unknown to plaintiff. The defendants whose identities are unknown are sued herein under the names DOES 1 through 200 (hereinafter "DOES"). Individual police officer defendants hereinafter referred to as "police officers" and any governmental entity defendants are referred to by proper name or as "governmental entity."

5. Plaintiff is informed and believes and thereon alleges that each defendant was the agent and employee of each other defendant and was at all times acting within the scope of such agency.

FACTS COMMON TO ALL COUNTS

6. Each and every allegation set forth in each and every averment of this Complaint is hereby incorporated by this reference in each and every other averment and allegation of this Complaint.

7. Plaintiff was deprived of an interest protected by the Constitution or laws of the United States, and defendants caused any such deprivation while acting under color of state law.

8. All acts or omissions alleged to have been engaged in by any defendant are alleged to have been engaged in with evil motive and intent, and in callous, reckless, and wanton disregard of the right of plaintiff.

9. Defendants CITY OF SANTA ANA, CITY OF IRVINE, PAUL WALTERS, Chief of Police of the Santa Ana Police Department, LEO PEART, at the time the claims arose herein the Chief of Police of the Irvine Police Department, and DOES are alleged to have maintained or permitted an official policy or custom of permitting the occurrence of the types of wrongs set forth hereinbelow knowingly, with gross negligence, or with deliberate indifference and, based on the principles set forth in Monell v. New York City Dept. of Soc. Serv., 436 U.S. 658 (1978) are liable for all injuries sustained by any plaintiff as set forth hereinbelow. All governmental entities are liable under California Government Code Section 815.2.

10. On or about June 25, 1991, during the daylight hours, named Santa Ana and Irvine Police Department officers and DOES violated CRAIG BROOK'S rights to due process under both state and federal law by failing to comply with all appropriate provisions of state law, including, but not limited to Cal. Penal Code Sections 118.1, 149, 203, 205, 206, 245, and Cal. Gov't Code Section 6204, and thereby are liable to CRAIG BROOKS under 42 U.S.C. Section 1983.

11. On or about June 25, 1991 named defendants Santa Ana Police Officers and unknown named Irvine Police Department officers and DOES subjected CRAIG BROOKS to excessive, unreasonable and unnecessary force by authorizing, causing and permitting an animal trained to attack and bite humans, that is a large german shepherd dog, to attack, bite and seriously injure plaintiff. The defendants knew or should have known that Mr. Brooks was under the influence of alcohol at the time they caused and permitted the dog to attack and bite Mr. Brooks. Mr. Brooks was unconscious at the time defendants caused and permitted the dog to attack Mr. Brooks. Defendants had probable cause to arrest Mr. Brooks for non-violent crimes only. Defendants did not have probable cause to believe nor any reasonable suspicion that Mr. Brooks had committed any crime involving force or violence. Defendants did not have probable cause to believe or reasonable suspicion that Mr. Brooks was armed. Defendants knew or should have known that Mr. Brooks had been searched by police

shortly before they caused or permitted the animal to attack and bite Mr. Brooks and that Mr. Brooks was not armed in any way. Defendants knew or should have known that Mr. Brooks was dressed only in shorts. Defendants knew or should have known that causing and permitting the animal to attack and bite Mr. Brooks was likely to inflict serious physical and psychological injuries to Mr. Brooks and that the animal was capable of killing Mr. Brooks. After the animal did attack and bite Mr. Brooks, the defendants at the location of Mr. Brooks arrest stood by and permitted the animal to continue to attack and bite Mr. Brooks, causing serious and permanently disabling injuries constituting mayhem under California Penal Code Section 203 and aggravated mayhem under California Penal Code 205, by failing and refusing to stop the animal from attacking and biting Mr. Brooks because Mr. Brooks, in an effort to protect himself against extreme pain, terror, severe physical injury and potential death, attempted to defend himself against the animal's onslaught. Such excessive force caused plaintiff special and general damages, physical injuries and extreme emotional distress including but not limited to serious punctures, laceration and hematoma to Mr. Brooks's leg and buttocks and wounds to other parts of Mr. Brooks's body.

12. Defendants CITY OF SANTA ANA, CITY OF IRVINE and their respective chiefs of police are alleged to have maintained or permitted an official policy or custom of permitting the occurrence of the types

of wrongs set forth above knowingly by, among other things, permitting and authorizing dogs to search for and attack persons. Defendants CITY OF SANTA ANA, CITY OF IRVINE and their respective chiefs of police and Raul Luna, who was in charge of the Santa Ana canine program, are charged with knowing misconduct, gross negligence, or with deliberate indifference and are liable for all injuries sustained by plaintiff as set forth hereinbelow. Furthermore, the municipal entities are liable under California Government Code Section 815.2.

13. The subject policies and practices include the following:

A. The CITY OF SANTA ANA, CITY OF IRVINE and their respective chiefs of police have maintained, sanctioned and approved a policy, practice and custom of using excessive force in violation of the Fourth and Fourteenth Amendments to the United States Constitution by using dogs to bite persons.

B. The Santa Ana and Irvine Police Departments and their respective chiefs of police and Raul Luna have adopted a policy of permitting the use of a dog to take people into custody by causing a dog to attack and bite the person whenever there is a reasonable suspicion of the person's involvement in criminal activity, whether felony or misdemeanor, adult or juvenile.

Pursuant to this policy, dogs are used to apprehend persons:

(1) who are not armed;

(2) who pose no immediate threat of injury to any person.

(3) without regard to the serious injuries the dogs inflict.

C. The Santa Ana and Irvine Police Departments and their respective chiefs of police have a policy, practice and custom of permitting a dog to continue to attack and bite a person for as long as the person attempts to defend himself or herself against the dog's attack. Many if not all persons attacked by a dog instinctively attempt to defend themselves against the dog's attack. The dogs are trained to react aggressively to any such attempt by biting. When a person resists a dog's attack, the CITY OF SANTA ANA AND CITY OF IRVINE's employees are trained to strike the person who is attempting to defend himself or herself against the dog's attack until such person stops trying to defend himself or herself against the dog's attack. Also, employees are trained and permitted to let the dog continue to attack and bite a person until the person being attacked and bitten becomes passive and stops trying to defend himself or herself against the

dog's attack. As a result of such policies, practices and customs, persons apprehended by the use of a dog are subjected to extreme and excessive force resulting in severe and unnecessary permanent mental and physical injuries. The use of the dogs in the manner permitted and encouraged by defendants constitutes the commission of mayhem and aggravated mayhem under California Penal Code Sections 203 and 205 and violates Penal Code Section 149.

D. The Santa Ana Police Department does not properly select dog handlers. It does not adequately screen for persons who are prone to the use of excessive force. As a result, defendant employs dog handlers who are prone to use and do use grossly excessive force.

E. The Santa Ana Police Department does not adequately train dog handlers. Because of defendants's reckless disregard and gross negligence, dog handlers are not adequately trained to limit the amount of force which may be used to take a person into custody to that amount of force which is reasonable and necessary. As a result, defendant's dog handlers regularly use grossly excessive force.

F. The Santa Ana and Irvine Police Departments do not adequately supervise and monitor the use of dogs. Because of the disregard and

gross negligence of defendants CITY OF SANTA ANA and CITY OF IRVINE, a custom and practice exists permitting dogs to be used to intentionally and needlessly injure, disfigure, and terrorize persons, especially those persons which dog handlers believe to have attempted to avoid contact with police.

G. The Santa Ana and Irvine Police Departments fail and refuse to investigate or discipline police officers charged with misconduct, including misconduct consisting of the use of excessive force, whether such force is inflicted by deputies using their hands, fists, and feet, or whether force is inflicted through attack dogs;

H. The Santa Ana and Irvine Police Departments condone and encourage a conspiracy of silence among their employees for the purpose of concealing and furthering wrongful and illegal conduct by its employees, including but not limited to the use of unnecessary, unreasonable force, in violation of the Fourth Amendment to the United States Constitution and the Constitution and laws of the State of California.

COUNT ONE

(4th Amendment/42 U.S.C. Section 1983)

14. The conduct of each defendant violated the right of plaintiff to be secure in person, against unreasonable

searches and seizures and not to be subjected to the use of excessive force, as guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution and entitles plaintiff to recover damages pursuant to 42 U.S.C. Section 1983.

Wherefore, plaintiff requests damages against each defendant as follows:

1. General damages according to proof.

2. Punitive damages according to proof (as to plaintiff's federal claims only).

3. Costs, interest, and attorneys' fees, and such other relief as is just and proper.

DATED: January 11, 1993

ROBERT MANN
DONALD W. COOK
Attorneys for Plaintiff

By /s/
Robert Mann

DEMAND FOR JURY TRIAL

Plaintiffs demand a jury trial.

DATED: January 11, 1993

ROBERT MANN
DONALD W. COOK
Attorneys for Plaintiff

By /s/
Robert Mann

PROOF OF SERVICE BY MAIL

I am a resident of the county of Los Angeles; I am over the age of 18 and not a party to the within action; my business address is 3600 Wilshire Blvd., Suite 1710, Los Angeles, CA, 90010.

On January 11, 1993 I served the within SECOND AMENDED COMPLAINT (PLAINTIFF BROOKS) on the interested parties herein by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Los Angeles, California addressed as follows:

David P. Lenhardt
James W. Parker
Kinkle, Rodiger & Spriggs
A Professional Corporation
837 North Ross Street
P.O. Box 1558
Santa Ana, CA 92702

Michele Vadon-Rivera
Karen J. Schuldt
Thomas A. Kathe, City Attorney
City of Costa Mesa; and
Burke, Williams & Sorensen
611 West Sixth Street
Suite 2400
Los Angeles, CA 90017

Wood, Hyland and Francis
A Professional Corporation
Charles J. Hyland, Esq.
3070 S. Bristol Street, Ste. 190
Costa Mesa, CA 92626

I declare under penalty of perjury that the above is true and correct.

Executed on January 11, 1993 at Los Angeles, California.

/s/
Dinorah Pinelo

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 93-56542
D.C. No. CV-92-00397-LHM (C
MEMORANDUM*

THOMAS SHANNON; CRAIG BROOKS,

Plaintiffs-Appellants,

v.

CITY OF COSTA MESA; CITY OF SANTA ANA; PAUL WALTERS, Chief of Police of the Santa Ana Police Department; RAUL LUNA; MICHAEL FLEET; ANTHONY BERTAGNA; WILLIAM LETIZIO; DAVE SNOWDEN; PAUL MCCARTHY; ROBERT DURHAM; BURTON SANTEE,

Defendants-Appellees.

Appeal from the United States
District Court
for the Central District of California
Linda H. McLaughlin, District Judge,
Presiding

Argued and Submitted August 3, 1994
Pasadena, California
Submission Deferred August 8, 1994
Resubmitted January 5, 1995

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Before: O'SCANNLAIN, T.G. NELSON, Circuit Judges, and MERHIGE, **
District Judge.

The parties are familiar with the facts, so we need not recite them here. This appeal involves two separate cases, essentially treated by Thomas Shannon and Craig Brooks as a single case despite a district court ordering the two cases severed. The alleged civil rights violations of the two plaintiffs involved different facts, circumstances, and incidents which occurred on two different days. Santa Ana police officers were involved in both cases. Costa Mesa police officers were involved in only the Shannon case.

Brooks

Officers Bertagna, Fleet, and Luna are entitled to qualified immunity. At the time of this incident, the law was not clearly established such that reasonable officers would have known that their actions in deploying a dog and assisting in the canine search for a felony hit-and-run arrestee, who escaped from custody while at a hospital and hid in foliage near a construction zone, violated a clearly established right. See Chew v. Gates, 27 F.3d 1432, 1447-49 (9th Cir. 1994), petition for cert. filed, 63

** Honorable Robert R. Merhige, Jr., Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

U.S.L.W. 3463 (U.S. Nov. 28, 1994) (No. 94-980); see also Mitchell v. Forsyth, 472 U.S. 511, 528, 535 (1985); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Brooks has not alleged the type of circumstances or conduct involving use of a police dog that would violate clearly established law. See Chew, 27 F.3d at 1448-49 (citing Mendoza v. Block, 27 F.3d 1357, 1362 (9th Cir. 1994) (giving example of officer siccing dog on handcuffed arrestee)).

Santa Ana Police Chief Walters is also entitled to qualified immunity. See Chew, 27 F.3d at 1446-50. Chew evaluated the issue of qualified immunity under the assumption that the "departmental policy authorized the use against all concealed suspects of dogs trained to search for and apprehend persons by biting and seizing them." Id. at 1446. In this case, Brooks was not just a concealed suspect; he was an escaped and concealed arrestee.

The City of Santa Ana, of course, would not be entitled to a qualified immunity defense. Chew, 27 F.3d at 1439. To prevail on a claim against the City of Santa Ana, Brooks must show: (1) the officers violated his constitutional rights, and (2) the City's policy caused the violation. Monell v. New York City Dep't of Social Servs., 436 U.S. 658, 690-92 (1978). Even assuming sufficient evidence of the actual municipal policy at

issue here,[1] Brooks has not demonstrated that he was deprived of federally protected rights. See 42 U.S.C. Section 1983. He contends that his Fourth Amendment rights have been violated and that he was not afforded the constitutional protections necessary under Graham v. Connor, 490 U.S. 386 (1989), and Tennessee v. Garner, 471 U.S. 1 (1985).

However, neither of these cases resolved the question of "whether the Fourth Amendment continues to provide individuals with protection against the deliberate use of excessive physical force beyond the point at which arrest ends and pretrial detention begins." Graham, 490 U.S. at 396 n.10. Graham applies to claims "aris[ing] in the context of an arrest or investigatory stop of a free citizen." Id. at 394 (emphasis added); see also id. at 395 n.10. In Garner, police shot and killed a suspect who did

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[1] A copy of the Santa Ana Canine Policy was included in plaintiffs' belatedly filed "Index and Excerpts of Testimony and Relevant Reports in Opposition to Motion for Summary Judgment." The district court refused to consider these belatedly filed documents. The court's refusal to consider these documents is "not specifically and distinctly raised and argued" in the opening brief, and will therefore not be considered on appeal. Officers for Justice v. Civil Serv. Comm'n, 979 F.2d 721, 726 (9th Cir. 1992), cert. denied, 113 S.Ct. 1645 (1993).

not appear to be armed to prevent his escape from the scene of a burglary. 471 U.S. at 4. The use of the dog occurred in this case after Brooks had been arrested, after he escaped from police custody in the hospital, but prior to pretrial detention. Brooks has not alleged that he was subjected to excessive force amounting to punishment. See Graham, 490 U.S. at 395 n.10. Nor has he made any argument that addresses the factual distinction between his case and the prearrest situation in Graham and Garner.

"[Section] 1983 is not itself a source of substantive rights, but merely provides a method for vindicating federal rights elsewhere conferred." Graham, 490 U.S. at 393-94 (internal quotations omitted). The Fourth Amendment analyses in Graham and Garner do not confer federal rights on Brooks, an escaped felony arrestee, that can serve as a basis for Monell liability. Compare Chew, 27 F.3d at 1439-43; cf. Robins v. Harum, 773 F.2d 1004, 1009-10 (9th Cir. 1985) (a pre-Graham case which held that excessive force by law enforcement official in the course of transporting an arrestee gives rise to a section 1983 claim based upon a Fourth Amendment violation).

Brooks has not alleged a constitutional basis for his section 1983 claim. There is no basis, therefore, for the imposition of Monell liability on the City of Santa Ana. See Monell, 436 U.S. at 690-92; see also Los Angeles v. Heller, 475 U.S. 796, 799 (1986) ("If a person has suffered no constitutional injury at the

hands of the individual police officer, the fact that the departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point.").

The district court properly granted summary judgment in favor of Officers Bertagna, Fleet, Luna, Chief Richardson and the City of Santa Ana.

Shannon

Even if the district court erred in granting summary judgment to Santa Ana Officers Letizio and Luna "without notice," because the notice of motion was amended to name the individual officers after Shannon had filed his opposition papers, we affirm the order. Officer Luna, who is in charge of the Santa Ana canine program, and who is alleged in Shannon's complaint to have been involved in adopting the policy, is entitled to qualified immunity just as was Captain McKinley in Chew, who had overall supervisory responsibility for the L.A.P.D. canine program. Chew, 27 F.3d at 1446. Officer Letizio, the canine handler, is entitled to qualified immunity because the law governing his conduct was not clearly established at the time of Shannon's arrest. Id. at 1447-50. Shannon has not alleged the type of circumstances or conduct that would violate clearly established law. See Chew, 27 F.3d at 1448-49. We note that although the district court granted summary judgment to Officers Fleet and Bertagna as well, these officers were not

named in Shannon's Third Amended Complaint.

Santa Ana Police Chief Walters is immune from suit under the qualified immunity doctrine. Chew, 27 F.3d at 1446-50. This leaves the question of the liability of the City of Santa Ana. Even assuming adequate evidence of the actual policy at issue in this case,[2] application of the Graham factors supported the decision to use canine force to arrest Shannon. Cf. Chew, 27 F.3d at 1441-43.

In determining whether the use of force to effect a seizure is reasonable, "the nature and quality of the intrusion on the individual's interests" must be balanced against "the countervailing government interests at stake." Graham, 490 U.S. at 396 (internal quotation omitted); see also Chew, 27 F.3d at 1440. Three factors are considered in weighing the governmental interests involved: (1) "the severity of the crime at issue," (2) "whether the suspect poses an immediate threat to the safety of the officers or others," and (3) "whether he is actively

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[2] See n.1, supra. Shannon also points out that in response to requests for admission, the City of Costa Mesa stated that the use of the dog to find and bite him was in accordance with the policies and practices of the City of Costa Mesa Police Department and pursuant to the authorization and directives of Costa Mesa Police Chief Snowden and Santa Ana Police Chief Walters.

resisting arrest or attempting to evade arrest by flight." Graham, 490 U.S. at 396 (citing Garner, 471 U.S. at 8-9).

These factors "are not to be considered in a vacuum but only in relation to the amount of force used to effect a particular seizure." Chew, 27 F.3d at 1441. In Chew, we considered but did not decide whether the use of dogs trained to bite and seize amounts to deadly force. Id. at 1435, 1442. If such use does amount to deadly force, it might be unconstitutional to employ dogs in circumstances like those in Garner. 471 U.S. at 3; see also Chew, 27 F.3d at 1452-53 (Norris, J., concurring in part and dissenting in part). The facts before us, however, are unlike those of Garner or Graham.

Shannon, who was seen by police speeding and running red lights at 4:30 a.m., pulled up onto the lawn of a restaurant and fled from police on foot, climbing five fences (including three that were between six and eight feet high and one that was barbed at the top), to hide in oleander bushes in the backyard of a house in a residential area. Construing the evidence in the light most favorable to Shannon, Santa Ana Officer Letizio was not informed about the outstanding warrants, or the nature of the warrants. However, the record reveals that it was undisputed that Letizio was told that Shannon had prior arrests for armed robbery. The Declaration of Robert Mann, relied upon for the assertion that this fact was disputed, speaks to Letizio's

alleged knowledge of the warrants, not the armed robbery arrests.

"Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." Garner, 471 U.S. at 11. Even assuming that the use of dogs trained to bite and seize constitutes the use of deadly force, we hold that the use of the dog in this case, by officers wishing to prevent harm to themselves and residents in the area, was objectively reasonable.

Review of the Graham factors leads to the same conclusion. The most important element, "whether the suspect poses an immediate threat to the safety of the officers or others," Chew, 27 F.3d at 1441, weighs against Shannon. Although Shannon, like Chew, was initially stopped for a traffic violation, Chew stopped for police, produced his driver's license, and spoke with police before his flight. Id. at 1442. As described above, Shannon's situation was different. Furthermore, Shannon hid in a residential backyard, not a commercial junkyard. The safety of the residents of the area also had to be considered. Unlike the situation in Chew, there is no material fact question about the immediate safety threat posed by Shannon. Compare id.

The other two Graham factors also weigh in favor of the government. As in Chew, an edge goes to the government on

whether Shannon was "actively resisting arrest" when he hid in the bushes and did not come out after a canine announcement. See id. When looked at in isolation, the severity of the crime (speeding and running red lights) seems somewhat minimal. However, there was also Shannon's immediate and somewhat elaborate flight, as well as the information given to Letizio that Shannon had been arrested for armed robbery.

We conclude that in Shannon's case it is appropriate to determine as a matter of law that it was reasonable for Officer Letizio to release the dog. Accordingly, there is no basis for Monell liability to be imposed upon the City of Santa Ana. Monell, 436 U.S. at 690-92; Heller, 475 U.S. at 799. The district court's grant of summary judgment to the City of Santa Ana is affirmed.

Shannon filed his opposition to the summary judgment motion of the Costa Mesa defendants three days late. The district court granted the summary judgment motion on the ground that Shannon filed no opposition. Summary judgment is not an acceptable sanction for failure to abide by a local rule. Marshall v. Gates, No. 93-55022, slip op. at 105-06 (9th Cir. Jan. 4, 1995). However, unlike Chief Gates' papers in Marshall, the Costa Mesa defendants met their burden of demonstrating an absence of genuine issues for trial. Id. at 106. We therefore affirm the grant of summary judgment to the Costa Mesa defendants.

Costa Mesa Police Sergeant Santee, who requested a Santa Ana canine officer and who Shannon also contends had a duty to intervene in the dog attack, is entitled to qualified immunity. The law governing his conduct was not clearly established at the time of Shannon's arrest. Chew, 27 F.3d at 1447-50. Officer McCarthy, who initially followed Shannon on foot and who Shannon contends had a duty to intervene in the dog attack, is also entitled to qualified immunity. Id.

To the extent that Shannon alleged that Sergeant Durham authorized, caused and/or permitted the use of the dog, he is entitled to qualified immunity. Id. Shannon also predicated Durham's liability on his alleged fabrication of Shannon's criminal history and the broadcast of this information to the officers in the field. However, while Shannon's opposition attempted to set forth many factual questions concerning Shannon's "arrest package," it failed to support the fabrication claim, or the claim that Shannon's prior history was unknown to officers at the time the dog was used to search for him. Shannon failed to meet his summary judgment burden on this point, see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986), and Durham is entitled to summary judgment.

Costa Mesa Police Chief Snowden is entitled to qualified immunity. Chew, 27 F.3d at 1446-50. Because there is no basis for Monell liability to be imposed upon the City of Santa Ana, there is no

basis for such liability to be imposed upon the City of Costa Mesa.

The Declarations and The State Law Claims

Even if the district court erred in concluding that the declarations of Peter Meade, M.D., and VanNess Bogardus, III, were inadmissible, they are insufficient to withstand the summary judgment motions in these case.

Under the circumstances, it is not necessary to remand the dismissal of the state law claims to the district court for a reexamination of the four categories enumerated in 28 U.S.C. Section 1367(c) in accordance with Executive Software N. Am., Inc. v. United States Dist. Ct., 24 F.3d 1545 (9th Cir. 1994). First of all, the district court properly dismissed all claims over which it had original jurisdiction. See 28 U.S.C. Section 1367(c)(3). To require a remand for the court to specify subsection 1367(c)(3) as a specific ground for dismissal based on Executive Software (decided after the district court's order in these cases), would elevate form over substance. More importantly, the district court properly dismissed the state law claims without prejudice because they were insufficiently pleaded. Although Shannon and Brooks contended at oral argument that they should have been given leave to amend, they did not make this argument in their opening brief. The issue is therefore waived. Officers for Justice v. Civil Serv. Comm'n, 979 F.2d 721, 726 (9th Cir.

1992), cert denied, 113 S.Ct. 1645 (1993).

CONCLUSION

We have considered the other arguments made by the appellants and conclude that no discussion is necessary. The summary judgments in favor of the defendants in the cases brought by Brooks and Shannon are AFFIRMED.

AFFIRMED